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Ontario
Labour Relations
Board

Decisions

March 84

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**A Monthly Series of Decisions from the
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Cited [1984] OLRB REP. MARCH

Selected decisions of particular reference value are
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2023-83-M The Bricklayers, Masons Independent Union of Canada Local 1, Applicant, v. The Masonry Contractors Association of Toronto Inc. and **Acadian Bricklayers Ltd.**, Respondents

Construction Industry Grievance – Practice and Procedure – Witness – Witness served summons and given cheque for amount of conduct money – Board disapproving payment of conduct money by cheque – Refusing arrest warrant where witness failed to appear

BEFORE: Ian C. Springate, Vice-Chairman, and Board Members F. W. Murray and C. A. Ballentine.

APPEARANCES: *M. Ball and John Meiorin for the applicant; David R. Rothwell and Len Carrado for the respondents.*

DECISION OF THE BOARD; March 26, 1984

1. This is a referral of a grievance to the Board pursuant to section 124 of the *Labour Relations Act*.
2. At a hearing held on March 7, 1984 the applicant requested that the Board issue warrants for the arrest of four individuals who had each been served with a summons to witness but who had failed to attend at the hearing. To date, that is the only issue dealt with by the Board.
3. It is now established that when dealing with referrals under section 124 of the Act, the Board has the same power to enforce the attendance of witnesses as a Court of Record in civil cases, including the power to issue a warrant for the arrest of a person who has failed to appear when duly served with a summons. See: section 3(2)(d) of the *Statutory Powers Procedure Act*, section 103(2)(a) of the *Labour Relations Act*, *Re International Association of Heat & Frost Insulators & Asbestos Workers Local 95 and Master Insulators Association of Ontario et al* 25 O.R. (2d) 8, and *Casalbil Contractor Limited* [1980] OLRB Rep. Sept. 1278. Because it is a serious matter affecting the liberty of the individual, the Board has indicated that it will exercise its power to issue an arrest warrant with caution and fairness. See: *Standard Insulation Limited*, [1984] OLRB Rep. Feb 383.
4. The evidence led in this matter establishes that the four individuals in question were each served with a summons to witness in reasonable time to allow them to attend at the Board hearing. However, instead of being provided with the appropriate amount of conduct money in cash, they were each provided with a cheque for the amount. The use of cheques causes us some concern. A witness is entitled to actual receipt of conduct money prior to being required to attend at a Board hearing. Banks, however, are not always open at convenient times to allow a cheque to be cashed. Further, individuals without a bank account may find themselves unable to cash a cheque. Even people with an account may be required to wait until a cheque has cleared before actually receiving the amount represented by the cheque. Problems may also arise due to a lack of sufficient funds in an account to cover a cheque. A stop-payment might be issued with respect to a cheque. Given all of these considerations, we do not believe it appropriate to issue warrants for the arrest of an individual who has been given

a cheque rather than cash when being served with a summons to witness. Accordingly, the Board declines to issue warrants for the arrest of the individuals in question.

5. On or about March 8, 1984 the parties were advised by telephone that the Board would not be issuing arrest warrants. This was done to provide the applicant with sufficient time to properly summons the individuals in question to the continuation of hearing set for March 27, 1984.

6. This panel of the Board has not heard any evidence with respect to the merits of the case. Accordingly, it is not seized with the referral.

2644-83-R United Food and Commercial Workers International Union, Canadian Labour Congress, AFL-CIO, Applicant, v. **Autotube Limited**, Respondent, v. Group of Employees, Objectors

Certification - Petition - Employee stating personal opinion that plant will close if union successful - Referring to another plant which closed after unionization - Management giving permission for meeting during work hours for discussion of pros and cons of unionization - Management not present at meeting - Employer took neutral hands off attitude - Petition voluntary

BEFORE: R. A. Furness, Vice-Chairman, and Board Members M. Eayres and L. Collins.

APPEARANCES: *Ian E. Reilly, M. Fraser, R. Pearson and J. Leeyus for the applicant; Brian P. Smeenk, R. Hayden and R. Strome for the respondent; Liza Jane Westelaken, Jane Mills, Virginia Frayne and Linda Robinson for the objectors.*

DECISION OF R. A. FURNESS, VICE-CHAIRMAN, AND BOARD MEMBER M. EAYRES; March 9, 1984

1. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

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3. Having regard to the agreement of the parties, the Board further finds that all employees of the respondent at St. Mary's, save and except lead hands, persons above the rank of lead hand, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.

4. The Board notes that the applicant withdrew its allegations of improper or irregular conduct and its request that the Board apply the provisions of section 8 of the Act as contained in its letter dated February 22, 1984. The Board inquired into the origination, preparation and circulation of a statement of desire which was filed in opposition to this application for certification. The respondent operates a plant which fabricates small diameter tube products for

the automobile industry at St. Mary's. The respondent employs about seventy persons at St. Mary's and about sixty of these persons are employees who are affected by this application.

5. The respondent's operations consist of an open plan machine shop, a quality control laboratory and offices. A cafeteria is provided for the use of employees. Most of the employees are women and all of the witnesses who appeared before the Board were women. The Notice to Employees of Application for Certification and of Hearing (the "green form") were posted on the respondent's premises during the afternoon of February 20, 1984. Liza Westelaken and Jenny Frayne each asked Roy Strome, the plant manager, to clarify paragraph seven of the green form. He did so and stated that he could only interpret for them and could not help them. Ms. Westelaken and Mrs. Frayne discussed the preparation of the statement of desire and on the evening of February 20th, Ms. Westelaken prepared the statement of desire at her home with the aid of a dictionary and her father's typewriter. On February 21 and 22, Ms. Westelaken and Mrs. Frayne collected signatures on the statement of desire.

6. Five meetings were held on February 21 and 22. The first two meetings occurred during the smokers' and non-smokers' break when Mrs. Frayne spoke to the employees on their break. The third meeting occurred on February 21 at 12:30 p.m. (which was after the lunch break) and lasted about twenty minutes. The fourth and fifth meetings occurred on February 22 during the smokers' and non-smokers' break when Mr. Strome spoke briefly.

7. At the first meetings Mrs. Frayne asked those in attendance to sign the statement of desire. At that time she told the employees that if the union came in the plant would close. When challenged to say how she knew that this would happen, she stated that she had been told this two years ago when she was hired by Steve Goodwin, the plant manager. Mrs. Frayne also referred to the closing of another employer which was organized in London and then moved to across the street in St. Mary's. Beyond that she was unable to base her prophesy on anything else.

8. The third meeting was held as a result of a request of a union supporter, Jean Tomczak, who asked a lead hand to obtain permission from management to hold a meeting in order that the employees could discuss the pros and cons of the union. Permission was granted and the shop was shut down for approximately twenty minutes while a meeting of employees was held in the cafeteria in the absence of members of management. At the end of this time, one of the leadhands told the employees that they had enough time and that they had to return to work. The meeting had degenerated into a shouting match and each side's supporters were compelled to make their points as and when they could. On the union side, it was argued that the employees needed help with health and safety problems. On the other side, it was argued that they did not need a union and that a union would mean that the employees could not spend as long in the washroom as they did, that they could not leave their work stations whenever they desired to get a cup of coffee and that they would not be able to continue the practice of arriving late for work. Remarks were also made about the plant closing if a union came in, although such remarks were not attributed to the present management of the respondent. Reference was also made to a conversation with a union organizer named John who had been asked if the doors would close and who is said to have replied that he could not guarantee what would happen after the union got in.

9. The fourth and fifth meetings were very brief and consisted of Mr. Strome telling all the employees who were present that there had been enough discussion for and against the

union and that it was time to get back to work because production was being affected. There is no doubt from all the evidence that advocacy for and against the union had diminished production on the respondent's premises.

10. In our view, the respondent adopted a hands off policy towards the opposing positions of its employees and paid them all without distinction when they spent time away from their machines and argued their points of view and also when Mrs. Frayne obtained the signatures on the statement of desire. Mrs. Frayne gave evidence that she frequently moves away from her machine to speak to such employees. However, in collecting signatures for the statement of desire she spent more time and moved further away from her machine.

11. When Mrs. Frayne obtained the signatures, members of management were not present and given the arrangement of the machines in the shop it is not always possible to see what is going on in the shop from any particular location in the shop. Mrs. Frayne carried a clip board when she was obtaining the signatures. The statement of desire was covered by another sheet of paper. Some employees were apparently reluctant to sign the statement of desire if it became known that they had signed it. In order to satisfy these apprehensions, Mrs. Frayne covered the signatures of those who had signed while exposing the heading on the statement of desire.

12. In assessing the effect of Mrs. Frayne's remarks about the closure of the plant, we find that there was no evidence that the present management was responsible for such remarks. Unfortunately, there was a gap in the evidence in that there was reference to new management in the last three months. It is unclear to us whether there has been a change of ownership or management over this period of two years. Mrs. Frayne, in our view, was expressing a personal opinion and, indeed, one of the witnesses called by the applicant, Donna Hartfield, agreed in cross-examination that she felt that Mrs. Frayne was giving her own views. Another witness, Cecelia Bolt, called by the applicant agreed in cross-examination that she did not think Mrs. Frayne had such information on good authority. Moreover, when Mrs. Frayne said she was obtaining signatures on behalf of the company, Mrs. Bolt agreed in cross-examination that she was not sure how she meant it and that she could have meant it as "for the employees".

13. The applicant introduced evidence of a meeting in the quality control laboratory between Mr. Strome, Ms. Westelaken, Mrs. Frayne and another employee. We are satisfied that the only purpose of this meeting was in connection with production in the shop and was not an attempt by the respondent to promote the statement of desire.

14. In conclusion, we are satisfied that Ms. Westelaken, who is a quality control inspector, and Mrs. Frayne, who is a press operator, acted in furtherance of their own views in originating, preparing and circulating the statement of desire. The respondent for its part tolerated a great deal of discussion and advocacy for and against the applicant and only interfered to the extent of telling both sides to get back to work because production was being affected. In our view, the twin spirits of assent and dissent are alive and well in the shop of the respondent at St. Mary's. We are satisfied on the balance of probabilities that the statement of desire represents the true and voluntary wishes of the employees who signed it.

15. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on February 23, 1984, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

16. The Board, in the exercise of its discretion under section 7(2) of the Act, orders a representation vote to be taken of the employees of the respondent in the bargaining unit. All employees of the respondent in the bargaining unit on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken will be eligible to vote.

17. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with the respondent.

18. The matter is referred to the Registrar.

DECISION OF BOARD MEMBER L. COLLINS;

I dissent. In my view management favoured the objectors. In particular, when Donna Hartfield asked if she could be given a clip board, Mr. Strome said "No, you've probably had a clip-board visit at your home". Apparently, the plant manager's orders were at the noon break on the second day of the petition's circulation to discontinue any further debate on the union matters as production was being affected. However, for the balance of the day the petitioner continued circulating the petition and remained in the plant after the end of her shift to solicit signatures. At the end of her shift she remained in the plant to get signatures from workers on the second shift. This was a clear indication of management involvement, I would therefore have dismissed the petition and certified the applicant.

2106-83-R; 2141-83-R United Brotherhood of Carpenters & Joiners of America Local 1256, Applicant, v. **Ben Bruinsma and Sons Limited**, Respondent, v. Construction Workers Local 53, CLAC (formerly known as Chatham Construction Workers Association, Local No. 53, affiliated with the Christian Labour Association of Canada), Intervener; International Union of Operating Engineers, Local 793, Applicant, v. Ben Bruinsma and Sons Limited, Respondent, v. Construction Workers Local 53, CLAC (formerly known as Chatham Construction Workers Association, Local No. 53, affiliated with the Christian Labour Association of Canada), Intervener

Bargaining Unit – Certification – Collective Agreement – Practice and Procedure – Wording of recognition clause not conclusive as to scope of bargaining unit – Content of collective agreement and evidence as to application may establish different scope – Board applying these principles and finding CLAC agreement province-wide in scope

BEFORE: Ian C. Springate, Vice-Chairman and Board Members I. M. Stamp and H. Kobryn.

APPEARANCES: *M. A. Church, D. Chappell and J. MacDowell for United Brotherhood of Carpenters & Joiners of America Local 1256; M. A. Church, E. Ford and J. Mihalich for International Union of Operating Engineers, Local 793; D. K. Robinson, Q.C., and A. Bruinsma for the respondent; W. R. Herridge, Q.C., Henk De Zoete and Paul Dodds for the intervener.*

DECISION OF IAN C. SPRINGATE, VICE-CHAIRMAN AND BOARD MEMBER I. M. STAMP; March 21, 1984

1. These are two applications for certification filed pursuant to the construction industry provisions of the *Labour Relations Act*.
2. Both of the applicant trade unions acknowledge that Construction Workers Local 53, Christian Labour Association of Canada ("Local 53") currently represents a bargaining unit of employees of the respondent. At issue is the geographic scope of the bargaining unit. Both Local 53 and the respondent employer contend that at the time of the filing of the instant applications for certification the bargaining unit encompassed all of the Province of Ontario. The applicant trade unions, however, contend that the unit was restricted to the Counties of Essex and Kent.
3. The respondent is a general contractor based in Chatham in Kent County. Most of the respondent's work is performed within the Counties of Essex and Kent. Local 53 is also based in Chatham. Until March of 1983 the Local's constitution provided that membership in the Local was open to "all employees in the construction industry and related industries, primarily employed within geographic areas numbers 1 (i.e. the Counties of Essex and Kent), 2 (the County of Lambton) and 3 (the Counties of Bruce, Elgin, Huron, Middlesex, Oxford and Perth) as set by the Ontario Labour Relations Board." In March of 1983 the territorial jurisdiction of the Local was expanded to encompass all of the Province of Ontario.
4. In 1965 Local 53 was certified by this Board to represent a unit of employees of the respondent described as follows:

“all employees of the respondent employed in the Counties of Essex and Kent, save and except foremen, persons above the rank of foreman and office staff.”

5. On or about November 30, 1967, Local 53 and the respondent entered into a first collective agreement with respect to the calendar years 1968 and 1969. Although at the time it was common for the Christian Labour Association of Canada and its locals to enter into collective agreements containing recognition clauses employing the same language as found in Board certificates granting the union bargaining rights, such was not done in this case. Instead, the recognition clause agreed to by Local 53 and the respondent contained no geographic limitation, but rather read as follows:

“The Employer recognizes the Union as the exclusive bargaining agent for its employees, other than:

- a) employees having a supervisory or confidential capacity or having authority to employ, discharge or discipline employees;
- b) office and sales staff.”

6. Attached to the 1968-1969 collective agreement was a schedule setting out wage rates to be paid to various classifications of employees. The schedule did not contain any reference to a geographic area. The collective agreement also contained the following provisions with respect to transportation, travel time and room and board.

“*Article 12 – Transportation, Travel Time and Mileage*

12.01 The Employer will provide transportation to jobs outside the City limits of Chatham, Ontario. If an employee’s car is used for such transportation, the owner shall be paid ten (10) cents per mile for such use.

12.02 Employees shall be paid travel time one way, to any job that is more than five (5) miles outside of the City limits.

12.03 *When the employees are working outside of Kent and Essex Counties*, the Employer agrees to pay for room and board, travel expense (ten (10) cents per mile), and travel time (one way). It is the Employer’s right to decide on the arrangements.”

(emphasis added)

7. In December of 1969, Local 53 and the respondent entered into a second collective agreement covering the years 1970 and 1971. This agreement contained the same recognition clause and wage schedule found in the earlier agreement. However, the article dealing with transportation and travel was amended to read as follows:

“14.01 If an employee’s car is used for transportation to and from jobs, the owner shall be paid ten (10) cents per mile for such use if the job is more than five (5) miles from the City limits of the City of Chatham.

14.02 Employees shall be obligated to travel together as much as possible to eliminate unnecessary car usage.

14.03 Employees shall be paid travel time, one way, at a flat rate of eight (8) cents per mile, from the Employers shop, to any job that is more than five (5) miles from the City limits of the City of Chatham. Such time shall be excluded from weekly working hours, for the purpose of calculating overtime."

It will be noted that the agreement no longer referred to room and board allowances. In addition, the specific reference to employees working outside of Kent and Essex Counties was removed, although it continued the provision whereby employees were to be paid travel time for "any job" more than five miles from the Chatham City limits.

8. On December 30, 1971 Local 53 and the respondent entered into a third collective agreement covering 1972 and 1973. This agreement contained the same recognition clause as did the two previous agreements. The wage schedule as well as the travel time provision were essentially the same as those in the 1970-71 agreement.

9. The parties entered into their fourth collective agreement on January 3, 1974. The agreement covered the years 1974 and 1975. The recognition clause remained the same. There was, however, a major change with respect to the wage schedule. Up to this point the various collective agreements had contained only a single wage schedule with no geographic reference. In this agreement, however, there were two schedules, one headed up "Classifications and Hourly Rates for Kent County", the other "Classifications and Hourly Rates for Essex County". The Essex County schedule provided for somewhat higher hourly wage rates. Traditionally, construction industry wage rates have been higher in Essex County than in Kent County. Although no evidence was led on point, counsel for Local 53 contended that the purpose behind the two schedules was simply to provide for higher wage rates for Essex County. There was also another alteration in the collective agreement. In dealing with transportation time, the agreement continued the requirement that employees receive travel time one way to any job more than five miles from the Chatham City limits. However, added to the article was the provision that "Travel time shall not apply for all work done in Essex County."

10. Collective agreements were also entered into covering the calendar years 1976-1977; 1979 and 1980-1981 with no changes to the relevant provisions. On December 11, 1981 Local 53 and the respondent entered into a collective agreement covering the 1982 calendar year. The agreement contained the same recognition clause as in earlier agreements with no geographical limitation, as well as separate wage schedules for Essex and Kent Counties. There were, however, alterations to the travel provisions. Rather than have employees receive pay at so many cents per mile for travel time to jobs more than five miles from the Chatham city limits, the new agreement provided that travel time to *any* job outside of the city limits would be paid at their regular hourly rate. In addition, there was added a provision respecting room and board for employees required to stay out of town. The relevant provisions of the agreement now read as follows:

"14.01 The Employer will provide transportation to jobs outside of the City limits of Chatham. If an employee's car is used for transportation

to and from jobs, the owner shall be paid eighteen (18) cents per kilometer, when authorized by the Employer.

14.02 Employees shall be obligated to travel together as much as possible to eliminate unnecessary car usage. No vehicle shall carry more than the standard designed capacity of such vehicle.

14.03 Employees shall be paid travel time, at their regular hourly rate, one way, to any job that is outside of the City limits.

14.04 All time spent on travelling outside of the regular working hours shall be paid at the regular rate of pay and shall not be considered as time worked for the purpose of calculating overtime, except for maintenance employees who travel between job sites on any working day.

14.05 When employees are required to stay out of town the Employer shall arrange for and provide adequate sleeping accommodations and provide employees with proper meals. If at all possible there will be a maximum of three (3) persons per average size room on out of town jobs.

14.06 Drivers of Employer-owned or operated vehicles other than pickup trucks shall book their driving time as time worked.

14.07 Travel time shall not be paid for work done in Essex County.”

11. On December 7, 1982 the parties entered into a collective agreement covering the 1983 calendar year. This was the agreement which was in effect when the two applicant trade unions filed their applications for certification. With respect to the relevant provisions, this agreement was similar to the 1982 agreement, namely, it contained a recognition clause with no geographic limitation, and provided for travel time pay for jobs beyond the Chatham City limits, with the exception of jobs in Essex County. The agreement also provided that where employees were required to stay out of town the respondent was to provide meals and sleeping accommodation. In addition it contained two wage schedules, one indicating it applied to Kent County, and a second one with somewhat higher wage rates, indicating it applied to Essex County. Attached to the agreement, however, was a jointly executed letter of agreement which provided that employees working in Essex County would actually be paid at Kent County wage rates. The letter also made “inoperative” articles 14.03 and 14.04 dealing with the payment for travel time. The letter indicated that the provisions with respect to pay for travel time were to be inoperative only until June 1, 1983 when they would be reviewed. The evidence led at the hearing suggests that in June of 1983, the parties agreed to extend the time period to the end of the year.

12. Over the objections of counsel for the applicants, the Board heard evidence respecting the applicability or otherwise of the collective agreement on certain jobs performed by the respondent outside of Essex and Kent Counties. The only person to testify in this regard was Mr. H. De Zoete, a business representative of Local 53. Mr. De Zoete assumed responsibility for the union’s dealings with the respondent in June of 1982, succeeding another union representative, Mr. John Kamphof, who had moved to Vancouver. The respondent was at the time actively engaged on a project at Alvinston in Lambton County. In the course of

giving his testimony Mr. De Zoete referred to a letter dated January 22, 1982 signed by Mr. Kamphof and addressed to the respondent. Mr. De Zoete testified that the letter had been in Local 53's files pertaining to the respondent. The text of the letter was as follows:

"Attention: Mr. A. Bruinsma

Dear Sir:

At a meeting with your employees it was agreed that the Union would for the Alvinson (sic) Ontario job only, suspend the travel time provisions as per Article 14 of the collective agreement."

This letter would have been in reference to the 1982 agreement, and prior to the letter of agreement making the travel time pay provisions inoperative.

13. Mr. De Zoete testified that while the respondent did not pay travel time on the Alvinson job, it did apply the provisions in the collective agreement relating to payments to benefit funds on behalf of employees on the project, as well as the deduction of union dues from the employees for forwarding to the union. Mr. De Zoete indicated on the project that the respondent paid employees the wage rates provided for in the Kent County appendix to the collective agreement.

14. Mr. De Zoete's evidence indicates that the respondent also performed work at Kincardine and Wiarton, both of which are in Bruce County. The evidence is not at all clear on the timing of the Kincardine job. However, it appears that the Wiarton job was performed, at least in part, during 1983. Mr. De Zoete testified that he did not discuss with the respondent the applicability of the collective agreement at the Wiarton job, but that he had regarded the agreement as being applicable, and that as far as he was aware the respondent had applied the agreement, paying the Kent County wage rates.

15. In 1983, the respondent also performed a job in Sarnia, in Lambton County. From Mr. De Zoete's testimony it appears that the respondent employed some of its regular employees on the job, and with respect to these employees it applied the terms of the collective agreement, paying them the Kent County wage rates and deducting union dues. According to Mr. De Zoete, on the Sarnia job the respondent also hired some other employees, an action which Local 53 regarded as a contravention of the terms of its collective agreement. According to Mr. De Zoete, Local 53 learned about these other employees shortly after the filing of the instant certification applications and reacted by filing a grievance alleging that the respondent had violated the agreement.

16. Mr. De Zoete testified that he had always viewed the collective agreement between the respondent and Local 53 as extending beyond the Counties of Essex and Kent, and that the company had never taken a contrary position. According to Mr. De Zoete, his understanding was that the agreement covered employees wherever they worked, although on a job distant from Chatham special conditions would be worked out. As already indicated, no one from the respondent testified at the hearing. However, counsel for the respondent submitted that the 1983 agreement should be viewed as having been province-wide in scope.

17. Subsequent to the filing of at least one of the instant certification applications, the

respondent and Local 53 entered into a new collective agreement for 1984. During the course of the negotiations leading up to this agreement, Local 53 proposed that the scope clause of the agreement be amended to refer to “all its (the respondent’s) employees in all sectors of the construction industry in the Province of Ontario”. The respondent agreed to the proposal. It is of some interest that the 1984 agreement contains the same transportation, travel time and room and board provisions as did the 1983 agreement, and also continues the practice of having one wage schedule for Kent County and another for Essex County. Mr. De Zoete testified that the change in the recognition clause was “simply to clarify what the parties have always understood”. Counsel for the two applicant unions, however, contends that the change reflects an acknowledgement that the 1983 agreement did not apply on a province-wide basis.

18. In seeking to ascertain the scope of the bargaining unit covered by a collective agreement, generally one need look no farther than the recognition clause contained in the agreement. However, at times a collective agreement when read as a whole may indicate that the agreement was not in fact meant to cover certain employees, even though they were not expressly excluded by the terms of the recognition clause. For example in *Re Town of Markham and Canadian Union of Public Employees, Local 1219* (1973), 3 L.A.C. (2d) 237 (Brandt), the issue arose as to whether temporary employees were covered by a collective agreement. The scope clause of the agreement stated that the employer recognized the union as the bargaining agent for “all employees” except for a number of enumerated exclusions, one of which was not temporary employees. After reviewing a number of subsequent clauses in the agreement, however, the arbitration board concluded the parties had intended to exclude temporary employees from the unit, and that the term “all employees” in the recognition clause “does not extend to temporary employees”. A somewhat similar conclusion was reached by this Board in *Re Murphy & Morrow Limited* [1962] OLRB Rep. March 415. In that case a local of the Operative Plasterers and Cement Masons International Association had entered into a collective agreement with a recognition clause which appeared to cover all employees of an employer. However, a number of other provisions in the collective agreement, particularly one which stated that the agreement applied to all work included in the jurisdiction of the union as outlined in its constitution, led the Board to conclude that the agreement was only intended to cover plasterers and plasterers’ apprentices and not any other classes of employees.

19. Just as other provisions in a collective agreement may detract from a scope clause, so also they may indicate that the parties intended a broadly written scope clause to be applied literally. In *Rockwell International Corporation* [1981] OLRB Rep. June 780 a collective agreement negotiated in the United States had a scope clause with no geographic limitation. Certain articles in the agreement including a reference to transportation costs and differing pay levels depending on whether one was working in the United States or Canada or elsewhere led the Board to conclude that the parties had in fact intended the agreement to apply outside of the United States.

20. In certain cases, the Board has looked beyond the terms of a collective agreement in determining the bargaining unit covered by the agreement and has also taken into account the practice of the parties. For example, in *Toronto Plastering Company Limited* [1968] OLRB Rep. Feb. 1108 a collective agreement entered into by the Operative Plasterers’ and Cement Masons’ International Association of the United States and Canada purported in its recognition clause to cover “all employees” of a company. However, based on evidence that the provisions of the agreement, including the stipulated wage rates, had been applied to plasterers and

apprentice plasterers employed by the company but not labourers, the Board concluded that the parties had not intended that labourers be bound by the agreement.

21. A case similar in certain respects to the one now before us was *Evans Lumber and Builders Supply Ltd.* 58 CLLC 18,117. In that case a collective agreement purported to cover all employees of a company. The agreement, however, contained no wage rates for resilient floor layers and their apprentices. In a brief decision relating to the status of the resilient floor layers, the Board stated:

“After carefully reviewing all the evidence, including the fact that wages and other working conditions of the resilient floor layers and their apprentices are not governed by this agreement, the Board is satisfied that it was not intended to apply and does not in fact apply to the resilient floor layers...”

Although the decision is not clear with respect to the issue, it appears that the Board based its decision on more than just a lack of a wage schedule for floor layers in the collective agreement.

22. The lack of a set wage in a collective agreement for a classification of employees does not of necessity lead to a conclusion that those employees are not within the bargaining unit covered by the collective agreement. Rather, it is possible that the parties contemplate that such wages will be arrived at in consultation between the employer and the union, or between the employer and the employees concerned, and that failing any such agreement, the wage rates will be unilaterally set by the employer. In *Re Stearns – Roger Canada Ltd. and Millwrights Union, Local 2736 (No. 1)* (1972) 2 L.A.C. (2d) 102 (Lindholm), it was held that a foreman who was an “employee” for the purposes of the British Columbia Labour Relations Act, but for whom no wage rate had been set out in the collective agreement (the foreman settling his wage directly with the employer), was an employee in the bargaining unit covered by the collective agreement. It is also possible that the parties may not have included a wage schedule for certain employees in a collective agreement simply because they neglected to put their minds to the issue. In *Re International Chemical Workers, Local 552 and Emery Industries (Canada) Ltd.* (1970) 21 L.A.C. 163 (Weatherill) there were two truck drivers who appeared to be covered by the general wording in the scope clause of a collective agreement. The schedule of wage rates attached to the agreement, however, made no mention of truck drivers. The arbitrator was of the view that the truck drivers had not been in the minds of the parties when they negotiated the collective agreement. Nevertheless, the arbitrator concluded that the drivers did come within the bargaining unit covered by the collective agreement.

23. We believe that the various Board and arbitration cases stand for the following principles. The scope of the bargaining unit covered by a collective agreement can generally be ascertained by the recognition clause in the agreement. However, a consideration of the remainder of the collective agreement may indicate that the recognition clause is not in fact an accurate reflection of the bargaining unit covered by the agreement. Where a reading of the agreement as a whole leaves an uncertainty as to the scope of the bargaining unit, one can seek to ascertain the intent of the parties to the agreement by way of extrinsic evidence, including evidence as to how the agreement has been applied. The fact that a collective agreement does not contain a wage rate for certain employees is one indication that the agreement

was not meant to cover those employees, although the lack of a wage rate by itself may not be sufficient to support such a conclusion.

24. In the instant case, the evidence as to how Local 53 and the respondent have applied their agreement dates only from 1982. Accordingly, for the preceding period we have only the provisions of the collective agreements themselves. In looking at the first collective agreement, the one covering the years 1968 and 1969, we have no hesitation in concluding that it was meant to apply beyond the Counties of Essex and Kent. Although the union was only certified for the two counties, the recognition clause in the agreement contained no geographic limitation. The wage schedule attached to the agreement also contained no geographic limitation. The agreement provided that travel pay was to be paid on any job more than five miles from the Chatham City limits, without any restriction only to jobs in Kent and Essex counties. Finally, and most telling of all, was the provision relating to job sites beyond the two counties which stated:

“When the employees working outside of Kent and Essex Counties, the employer agrees to pay for room and board, travel expense (ten (10) cents per mile) and travel time (one way). It is the Employers right to decide on the arrangements.”

The 1970-1971 and 1972-1973 agreements did not contain any express reference to jobs beyond the Counties of Essex and Kent or to room and board allowances. They did, however, contain a provision respecting travel time pay unrestricted by any geographic limit. Further, nothing in the main body of the agreements detracted from the geographically unrestricted recognition provision. In these circumstances, we believe it reasonable to assume that the parties intended the agreements to remain geographically unlimited.

25. The real difficulty arises from the inclusion in the 1974-1975 and subsequent agreements of two wage schedules, one stated to be for Essex County and the other for Kent County, with no provision dealing with jobs in other areas. One possible interpretation of this is that the parties to the agreement meant to limit the scope of the agreement only to the Counties of Essex and Kent. However, the parties may also have felt that since the respondent only infrequently performed work outside of Essex and Kent, and since working conditions often vary in different parts of the Province, it would be better not to set specified wage rates for jobs outside the two counties but rather to leave the matter open. The only other subsequent change of any relevance was the re-introduction in the 1982 agreement of a provision respecting room and board allowances. Employees based in Chatham are likely to be able to commute daily to most centres in Kent and Essex Counties. However, there are some communities in the two counties which are some distance from Chatham, and accordingly, the mere inclusion of the room and board provisions does not necessarily mean that the agreement was meant to apply outside of Essex and Kent Counties. In all of the circumstances, we feel that the 1963 agreement is not clear on its face as to the geographic scope of its coverage and, accordingly, we can look to the evidence as to how the agreement and the agreements preceding it were actually applied.

26. The evidence indicates that Mr. De Zoete, the Local 53 representative responsible for the union's dealings with the respondent, considered the agreements as applying beyond Essex and Kent Counties. Although the agreements contained no wage rates for areas beyond

the two counties, on jobs actually performed outside of the two counties, the union was content that the respondent pay the Kent County rates. Indications are that the respondent's general practice was either to apply the terms of the agreement, or to enter into some contrary arrangement with the union. The January 22, 1982 letter wherein the union agreed to suspend the travel time provisions of the collective agreement for a job in Lambton County is particularly noteworthy in this regard since it indicates Local 53 felt that otherwise the relevant terms of the agreement would apply. Although the respondent has apparently not applied the terms of the agreement to all of its employees on the recent Sarnia job, Local 53 has filed a grievance complaining about the alleged breach. Taking all of this evidence into account, we are led to conclude that in their first collective agreement the respondent and Local 53 entered into a collective agreement covering a province-wide bargaining unit, and that in all likelihood they did not intend in their subsequent agreements to restrict the scope of that unit only to Essex and Kent Counties. Accordingly, we are satisfied that the wording of the recognition clause in the 1983 agreement should be given effect to, namely, that it applied to all of the Province of Ontario and not only to the Counties of Essex and Kent.

27. In reaching this decision, we have rejected the contention of the applicant trade unions that prior to the 1983 amendment to its constitution, Local 53 lacked jurisdiction to represent employees beyond Essex and Kent Counties. The former constitution of the Local allowed it to take into membership employees who were "primarily employed" within Board areas 1, 2 and 3. The evidence strongly indicates that the respondent's employees were "primarily employed" within these three areas. Indeed, the only jobs referred to at the hearing were all situated within the three Board areas.

28. At the hearing, the applicant trade unions contended that if the 1983 collective agreement between the respondent and Local 53 did purport to cover the entire province (as we have concluded that it did), then they would take the position that Local 53 was not legally entitled to enter into such an agreement. Accordingly, when this matter comes back on for hearing, that is one of the issues that the Board will address.

29. The Registrar is directed to re-list this matter for continuation of hearing with respect to all outstanding matters.

DECISION OF BOARD MEMBER H. KOBRYN;

1. I cannot agree to the interpretation the majority of the panel have given to certain clauses in the intervener's collective agreement with the respondent, and the conclusion that was reached, stating that the collective agreement in effect at the time application for certification by the Carpenters and Operating Engineers was provincial in its geographic scope.

2. When the first collective agreement was entered into between the respondent and the intervener it basically covered the respondent's operations in Chatham and Kent Counties. As the respondent started to expand his operations a few years later into Essex County, and by the fourth collective agreement recognition to this expansion was given by putting two schedules of "Classifications and Hourly Rates for Kent County" the Classifications and Hourly Rates for Essex County".

3. This was the first time the respondent and the intervener put their minds to the fact that the respondent has expanded his operations beyond the Kent County. At the same round

of negotiations the intervener agreed to remove from the collective agreement any reference of transportation time in Essex County when he added to the article the provision that “travel time shall not apply for all work done in Essex County”.

4. That collective agreement and the subsequent collective agreements remained basically the same, just covering the Counties of Essex and Kent through reference to the two Classifications and Hourly Rate Schedules one for each county. Now, collective agreements that contain a Commuting, Travel and Board Allowance clause in them are there for one purpose and that is to protect the employee from suffering any unnecessary travel and living away from home expense when he is sent by his employer to work at a distant job site. Unless of course, if his union cuts a deal with the employer, as they did on the Alvinston job wherein the employees were deprived of his negotiated benefit as listed in the collective agreement. Or as in Essex County this benefit was negotiated out of the collective agreement.

5. When I worked for a bridge building company located in Windsor, they had a signed agreement with a Building Trades Local Union also located in Windsor. As an employee of this company I was sent by my employer to many far ranging job sites (i.e. Sydney, Nova Scotia, Goose Bay, Labrador, Terrace Bay, Sudbury, Hamilton, Toronto and many other job sites). These job sites were all outside the area covered by the collective agreement. At no time was it ever considered by either party that the collective agreement covered these various distant job sites.

6. So basically the Commuting, Travel and Board Allowance clauses in a collective agreement serve one purpose and one purpose only, and that is to protect the employee against unnecessary expenses when the employee is away from his home base at the request of the employer. It cannot possibly be inferred that somehow this clause expands the geographic scope of collective agreement.

7. Furthermore, this respondent and this local union did not put their minds to the expansion of the geographic scope of the collective agreement until negotiations began on the 1984 renewal agreement. The reason for this move is most apparent and that was these present applications for certification that are presently before this Board. Both parties realized how vulnerable they were under the wording of their current collective agreement.

8. One of the many reasons why I have come to the conclusion that the respondent and the local union did not put their minds to the subject of expansion of the geographic scope is the fact that if a union has an employer that ranges far and wide with his work sites, this fact is immediately noted in the collective agreement to protect the employees wage rates, especially if you have an agreement with two wage schedules with one being higher than the other. The local union would negotiate a sub-clause into the wage rate schedule which would stipulate which wage rate would apply when the employee is required by his employer to work at a job site away from his home base.

9. In the union collective agreements I am familiar with we had the following sub-clause added:

“Employees that are sent by an employer to work in a territory other than the one in which his local union is located shall receive the combined wage rate, welfare and pension contributions and board allowance

of either the local in which the project is located, or his own local, whichever is the higher.”

This is a way to protect the employee's wage rate etc. and in this instant case this was not done.

10. A further reason for my conclusion is the fact that you have here a long established respondent in the construction industry who lacks no sophistication in the labour relations field. Who is fully aware of the advantage of being unionized by this local union with its industrial type collective agreement covering all his classification of employees in this field. Rather than a Building and Construction Trade type of unionization by the various Building and Construction Trade Unions and their respective Trades Collective Agreements to cover his varied work force. This advantage is most noticeable when bidding against Building and Construction Trades unionized contractors in the ICI sector of the construction industry. Wherein the industrial type collective agreement with its lower rates of wages and fringe benefits for the various construction tradesmen in his employ, together with the fact this local union is much easier to get along with. This is amply demonstrated in their approach when dealing with travel expense.

11. Yet this same employer was not aware that he was signed to a collective agreement over the years that covered the whole of the Province. If this sophisticated employer had been aware of this fact he would not have hired non-members of the Christian Labour Association of Canada for the project in Lambton County with its subsequent results being this present application for certification by these two unions.

12. The third reason for my conclusion that the respondent and the local union did not, at any time before the 1984 collective agreement was signed, put their minds to the expansion of the geographic scope of the previous agreements because that is not *modus operandi* of the Christian Labour Association of Canada in this Province to sign province-wide agreements. This fact comes out most clearly in Board File No. 1063-83-R in *Decew Crafts Inc.*, *Stephens & Rankin Inc.*, *Stephens & Bass Limited* and *D.L. Stephens Contracting (Niagara) Limited of Niagara Falls, Ontario* an application by the Carpenters Local Union No. 38 in a section 1(4). When Mr. W. R. Herridge, counsel for the Christian Labour Association of Canada questions Mr. D. L. Stephens, President of the above mentioned companies:

“Is the CLAC certified for your company outside this area?

“Yes, we have been certified by the CLAC in Owen Sound, London and the Hamilton area.”

That is the way the Christian Labour Association of Canada has treated their contractors when they moved outside the area they normally worked in. Certifying the contractor for each new area the contractor moved into, this way preventing the Building Trades Unions from moving against them as they did in this instant case.

13. Finally there is no factual evidence within the body of this collective agreement to suggest that the parties intended to expand the geographic scope of this collective agreement beyond the Counties of Essex and Kent till they were surprised by the applications for certification by the Carpenters and the Operating Engineers Unions, and then, and then only, did

they put their minds to this subject matter for the first time and amended the scope clause in the 1984 collective agreement to cover the whole Province of Ontario.

14. For all the above reasons, I find that the above-mentioned collective agreement is not a bar to these applications for certification that are before this Board.

15. The Registrar should re-list this matter for continuation of hearing to complete hearing these certification applications.

2285-83-U Ontario Nurses' Association, Complainant, v. Brantwood Manor Nursing Homes Limited, Respondent

Settlement – Unfair Labour Practice – Unfair labour practice complaint settled in writing – Employer not complying with requirement to pay lost wages – Whether settlement ambiguous – Settlement not made conditional upon employees reinstated continuing employment or union withdrawing outstanding grievance – Non-materialization of employer's expectations not initiating settlement – Request for award of interest on amounts unpaid denied

BEFORE: R. O. MacDowell, Vice-Chairman, and Board Members J. D. Bell and L. Collins.

APPEARANCES: *Susan Stewart, Judith McCormack and Liz Woods for the complainant; Stephen Bernofsky, Delaine Foster and Marion Hallatt for the respondent.*

DECISION OF THE BOARD; March 14, 1984

I

1. This is a complaint under section 89 of the *Labour Relations Act* alleging a breach of the written settlement of an earlier unfair labour practice complaint. Section 89 reads, in part, as follows:

89-(1) The Board may authorize a labour relations officer to inquire into any complaint alleging a contravention of this Act.

(2) The labour relations officer shall forthwith inquire into the complaint and endeavour to effect a settlement of the matter complained of.

(3) The labour relations officer shall report the results of his inquiry and endeavours to the Board.

(4) Where a labour relations officer is unable to effect a settlement of the matter complained of or where the Board in its discretion considers it advisable to dispense with an inquiry by a labour relations officer, the Board may inquire into the complaint of a contravention of this Act and where the Board is satisfied that an employer, employers' organization,

trade union, council of trade unions, person or employee has acted contrary to this Act it shall determine what, if anything, the employer, employers' organization, trade union, council of trade unions, person or employee shall do or refrain from doing with respect thereto and such determination, without limiting the generality of the foregoing may include, notwithstanding the provisions of any collective agreement, any one or more of,

- (a) an order directing the employer, employers' organization, trade union, council of trade unions, employee or other person to cease doing the act or acts complained of;
- (b) an order directing the employer, employers' organization, trade union, council of trade unions, employee or other person to rectify the act or acts complained of; or
- (c) an order to reinstate in employment or hire the person or employee concerned, with or without compensation, or to compensate in lieu of hiring or reinstatement for loss of earnings or other employment benefits in an amount that may be assessed by the Board against the employer, employers' organization, trade union, council of trade unions, employee or other person jointly or severally.

• • • •

(7) Where the matter complained of has been settled, whether through the endeavours of the labour relations officer or otherwise, and the terms of the settlement have been put in writing and signed by the parties or their representatives, the settlement is binding upon the parties, the trade union, council of trade unions, employer, employers' organization, person or employee who have agreed to the settlement and shall be complied with according to its terms, and a complaint that the trade union, council of trade unions, employer, employers' organization, person or employee who has agreed to the settlement has not complied with the terms of the settlement shall be deemed to be a complaint under subsection (1).

2. The first complaint (Board File No. 1521-83-U) was filed in October 1983 and alleges that the respondent employer has engaged in a variety of unfair labour practices including the unlawful discharge of three of its employees. The particulars of these various allegations need not be repeated here. It suffices to say that, in accordance with its usual practice and pursuant to section 89(2) of the Act, the Board appointed an Officer to meet with the parties and endeavour to effect a settlement of the matters complained of. However, these settlement efforts were unsuccessful, and the proceeding came on before the Board for hearing on November 9, 1983. One day was insufficient to complete the evidence so the hearing was scheduled for continuation.

3. Between the first day of hearing and the second scheduled day there were further

settlement discussions which resulted in the preparation and execution of the following settlement document:

File No. 1521-83-U

BETWEEN:

Ontario Nurses' Association,
Complainant,

- and -

Brantwood Manor Nursing Homes Limited,
Respondent.

AGREEMENT OF THE PARTIES

The parties agree that the above-named complaint shall be resolved without prejudice in the following manner:

1. ONA acknowledges the right of the manor to create three full-time registered nursing positions.
2. Mrs. T. MacDonald has been hired into the day shift as a nursing unit administrator, which the Manor considers to be outside the bargaining unit. The Manor has re-posted the remaining two full-time positions and offered them to incumbent R.N.'s on the basis of the criteria set forth in Article 10:07 of the collective agreement and considers these two positions to be within the bargaining unit. The Manor will consider applications from incumbent staff before hiring from the outside. If candidates do not apply from within for the other positions, the Manor can hire from the outside.
3. Remaining part-time R.N.'s shall be offered the opportunity to perform relief work which shall be distributed equally among those R.N.'s with a minimum guarantee of at least four (4) tours per pay period each.
4. Work presently performed by R.N.'s in the bargaining unit shall not be performed by anyone outside the bargaining unit unless and until all R.N.'s in the bargaining unit have been offered the work.
5. All scheduling will be discussed at the Nurse Management meetings.
6. The Manor agrees to reinstate K. Nichols, D. Anderson and T. Van Schyndel to full seniority, service for all purposes as if they had not been terminated and agrees to pay for all time lost on the following basis:

K. Nichols - 7-1/2 dys
 T. Van Schyndel - 17 dys
 D. Anderson - 15-1/2 dys

The above amounts shall be paid to the nurses on the pay day next following the date of this agreement.

7. The Complainant hereby requests leave of the Board to withdraw the complaint.

Dated at Toronto, this 6th day of December, 1983.

It is this written settlement which forms the basis of the present complaint since the employer has not paid the sums mentioned in paragraph 6. It might be noted that the individuals executing the document on behalf of the employer are both solicitors and that, apart from that, Mr. Hallatt is an owner of the respondent. There is no dispute that they had both the ostensible and actual authority to settle the complaint. In accordance with paragraph 7 of the settlement, the Board issued a decision granting leave to withdraw the complaint, thereby terminating the proceeding and making further hearing days unnecessary.

4. It is conceded that the respondent has failed to pay any of the monies purportedly owing pursuant to paragraph 6 of the settlement. The employees were reinstated to their former positions and worked for a time, but the amounts payable under paragraph 6 (in total, a little off \$4,400) were not paid to the aggrieved employees on the pay day next following the execution of the settlement, or at any time thereafter. That is what triggered the second complaint based upon section 89(7) of the Act. The respondent's reasons for its position were elaborated before the Board at a hearing held on February 22, 1984. The purpose of the hearing was to determine whether the Board should require compliance with paragraph 6 of the settlement.

5. At the hearing on February 22, 1984, the Board required each of the parties to particularize its position and stipulate those purported facts upon which it relied. The chronology of events was not really disputed, although each party asserted that the Board should appreciate "the whole picture". To this end, both parties indicated an intention to call a number of witnesses whose evidence would touch not only upon the settlement process itself, but also the unfair labour practice complaint and events in the weeks following the execution of the settlement document. It was obvious that such enquiry, once begun, could not be completed on February 22, 1984. The respondent indicated that one witness it wished to call was not available that day, and given the potentially broad scope for cross-examination, the Board even had some doubt whether the evidence could be completed with one further hearing day. Moreover, it was much less obvious that *any* viva voce evidence was necessary or that the facts sought to be advanced or proved would really affect the ultimate result - hence the Board's effort to get the parties to stipulate and particularize their positions. There seemed little point in embarking upon a potentially protracted enquiry which could not affect the ultimate result.

6. The respondent's position is that the whole settlement is void because the union and/or certain of the employees it represents have acted "in bad faith". Alternatively, the respondent argues that the parties were not *ad idem* when the document was executed, certain

of its terms are ambiguous and that because the provisions are not severable, the entire settlement is void. The respondent submits that it does not have to pay anything to the employees who were terminated, nor otherwise comply with the terms of the settlement. The respondent takes the position that the unfair labour practice complaint is, in a sense, “revived”, so that the hearing begun on November 9, 1983 should now proceed to its conclusion as if there had been no settlement at all.

7. It is necessary to examine the employer’s position in a little more detail, taking into account both those facts which are agreed or conceded, and those which the employer alleges to be so.

8. In the first place, it is clear that the three employees did in fact return to work, either pursuant to the settlement itself or the discussions preceding its execution. But each only remained in the respondent’s employ for a few weeks. Shortly after their return to work each employee gave two weeks’ notice of her intention to resign and subsequently did so. The respondent’s position is that these employees must have formed the intention to resign prior to returning to work and, in any event, their resignation so soon after reinstatement was both unexpected and not in keeping with the spirit or intention of the settlement. The respondent concedes that there was no undertaking or discussion about these employees continuing in employment for any particular period, nor is there anything to that effect in the settlement. That is why it came as such a surprise, which, the respondent submits, forced it to “scramble” during the holiday season to find replacements. The respondent also seeks to lead evidence to show that its intention in entering into the settlement was to achieve some stability at the Home and that it was surprised when the union failed to withdraw an outstanding grievance respecting the status (for a time) of Mrs. T. MacDonald mentioned in paragraph 2 of the settlement. However, as will be seen, the settlement itself does not deal with or require the withdrawal of outstanding grievances under the parties’ collective agreement and it is conceded by counsel for the respondent before this Board that there was no express undertaking in this regard. Nevertheless, the respondent seeks to lead evidence to show that, in context, that is what the employer anticipated and expected because the respondent viewed the purpose of the settlement as resolving all outstanding issues between the parties in all forums and “on all fronts”. The respondent advised the Board that that would be the testimony of Mr. Marini and, the respondent’s position is that when this was not the case it became apparent that the parties were not *ad idem*.

9. In the alternative, the respondent takes the position that paragraphs 2 and 4 of the settlement are ambiguous. For example, the respondent asserts that paragraph 4 is ambiguous because it does not expressly deal with the distribution of work which might (but need not necessarily) be offered as overtime opportunities for the established nursing complement.

10. The union’s position is much narrower. The union asserts that, in this proceeding, it is seeking only the enforcement of paragraph 4 of the settlement. No other clause is in issue, nor, at this point at least, does the union seek compliance with any of the other terms of the settlement. The union is simply trying to collect the money which, it says, should have been paid to the aggrieved employees shortly after their return to work. The union argues that the employees’ intentions or conduct subsequent to their reinstatement was not dealt with in the settlement and is irrelevant; although, the union stands ready to lead evidence on that

question should the Board decide otherwise, as well as on the context of the settlement discussions which the respondent says gave rise to the expectations or implicit understandings to which it referred.

11. The union also notes, and it is not now disputed, that Ms. T. MacDonald mentioned in paragraph 2 of the settlement now occupies the position of director of nursing which the union concedes now is a managerial position beyond the scope of the bargaining unit. To that extent (as the respondent concedes), the dispute concerning her status – the subject matter of the grievance – is now largely academic. The only real issue is whether, for a time, in accordance with the terms of the applicable collective agreement, certain union dues or assessments (amounting to about \$150.00 in total) should have been deducted and remitted to the union. Counsel for the union points out that again, regardless of what the employer may have hoped or anticipated, there is nothing in the settlement respecting the withdrawal of outstanding grievances or the settlement of any other matters in dispute between the parties. The extent of the settlement is defined by its express terms; moreover, the union emphasizes that, in this proceeding it is only paragraph 6 which is at issue. There is no ambiguity in paragraph 6. It is irrelevant that paragraph 4 may be ambiguous or that there may be some question as to how it should be applied in particular circumstances. Paragraph 4 is not the focus of this complaint; it is the compensation claim under paragraph 6. The employer does not dispute “the arithmetic” – that is, the sums which it would have to pay if the obligation in paragraph 6 is enforceable, nor is there any dispute that aggrieved employees were not paid such sums either on their first pay day following December 6, 1983, or at any time thereafter. The union seeks a declaration that the employer has failed to comply with paragraph 6 of the settlement and a direction that the sums contemplated be payable forthwith.

II

12. The purpose of section 89 of the *Labour Relations Act* is to secure a prompt, final and binding resolution of unfair labour practice complaints, and the Act expressly recognizes and endorses the settlement of such complaints without a formal Board hearing or a formal Board decision. Section 89 is intended to facilitate settlements which, once reduced to writing, are supposed to be binding. Non-compliance with a written settlement is treated as a breach of the Act itself and triggers the same remedial jurisdiction. Against that background, the Board would be loath to adopt any approach which might limit or impair the settlement process, or discourage its use. In principle, a written settlement should not lightly be disregarded – particularly where, as here, both parties were acting with legal advice and the two signatories for the respondent were themselves solicitors.

13. Every year trade unions and employers file thousands of applications or complaints before the Board. Most of them are settled. Sometimes the settlement favours the union. Sometimes it favours the employer. Usually it represents a compromise in which neither side achieves as much or risks as much as it would by proceeding to a hearing. Parties come to a settlement in order to avoid the costs and uncertainties of litigation and on the basis of such agreements, they undertake obligations and the Board issues decisions which are intended to be binding. In our view, it would make nonsense of the settlement process and gravely prejudice the orderly resolution of Board proceedings if, having reduced its agreement to writing, a party could afterwards repudiate it because it did not meet unexpressed expectations or supposedly implicit understandings which do not appear on the face of the document itself. What is the purpose of the statutory requirement for writing if a party can afterwards claim “X was

unstated but implicit, and if you do not agree with me we were not *ad idem* so the whole settlement is void”? If that submission were accepted few settlements (or contracts for that matter) would ever stand. Nor do we accept that the party can repudiate unambiguous obligations or avoid a settlement in its entirety because some provisions of that settlement may turn out to be ambiguous in their application to particular cases. If the parties have created obligations which are difficult to interpret, there may be difficulty obtaining enforcement pursuant to section 89(7), but this does not mean that the entire settlement is void. There may well be situations where the Board would reach that conclusion, but this is certainly not one of them.

14. The settlement in this case does not contain any preamble reciting the parties’ expectations, whatever they may have been. There is no requirement in paragraph 2 to settle any other proceedings, nor, the employer concedes, any express undertaking in this regard – whatever the employer may have expected or regarded as “implicit”. There is no requirement that the three individuals should continue to work for the employer for any prescribed time, nor any waiver of their right to quit should they decide to do so subsequent to their reinstatement. And even if they had resolved to quit prior to the execution of the settlement or after receiving the money to which they were entitled by its terms, we do not think that this vitiates the settlement as a whole or the obligation to pay. The employees’ position was that they had been unlawfully discharged. The unfair labour practice complaint was designed to secure reinstatement and compensation. The settlement provided for reinstatement and compensation (albeit, in the union’s submission, a compromised sum,) and the settlement provides no more than that, nor contains any additional conditions. The employees went back to work. They have not been compensated. When the settlement was executed the employees may already have formed the intention to quit at a time convenient for them, or they may have come to that conclusion after their return to work. We do not think it matters. Even assuming the employer’s best case – that is, that through evidence it can establish its subjective intention and belief that the settlement would resolve all outstanding matters, and that it did not anticipate that the employees would quit – we are of the view that this would not vitiate a settlement made binding and given statutory force by section 89(7) of the Act. No doubt things did not work out as the employer thought they would, and, no doubt, in hindsight the employer regrets the terms to which it agreed, but that is no basis for repudiating the settlement or reopening the earlier litigation.

15. For the foregoing reasons, the Board is satisfied that it is unnecessary to hear evidence from either the employer or the union since nothing which either party seeks to prove by that evidence could affect our conclusion as to the disposition of this matter. It would only exacerbate an already difficult bargaining relationship and generate unnecessary legal expense. It is unnecessary in this case to entertain such extrinsic evidence, or go behind the document which the parties have executed.

16. The Board finds that the respondent employer has failed to comply with paragraph 6 of the settlement dated December 6, 1983, and directs that it forthwith pay to Ms. K. Nichols the sum of \$852.98; to Ms. T. Van Schyndel the sum of \$1,894.48; and to Ms. D. Anderson the sum of \$1,659.74. During argument counsel for the union observed that these sums, although accurately reflecting the “arithmetic” of the formula agreed upon in the settlement, did not include any component in respect of interest on the amounts which were admittedly still unpaid as at the time of the hearing. But the settlement itself does not mention

interest either and, whether or not the Board has jurisdiction to award interest pursuant to its broad remedial authority under section 89, we are of the view that this is not a case for interest. Finally, we express no final opinion as to the meaning or alleged ambiguity of paragraph 4 of the settlement which is not directly in issue before us.

0290-83-U International Woodworkers of America Local 2-69, Complainant, v. Consolidated Bathurst Packaging Ltd., Respondent

Damages – Duty to Bargain in Good Faith – Remedies – Unfair Labour Practice – Prior decision finding bad faith bargaining by failure to disclose plant closure – Board computing damages flowing from contravention

BEFORE: George W. Adams, Q.C., Chairman, and Board Members W. H. Wightman and B. K. Lee.

APPEARANCES: *Paul J.J. Cavalluzzo, David I. Bloom and William Kaplan for the applicant; and Michael Gordon and Ronald Gruber for the respondent.*

DECISION OF CHAIRMAN, GEORGE W. ADAMS, Q.C. AND BOARD MEMBER B. K. LEE; March 16, 1984

1. In the Board's earlier decision it directed that this matter be rescheduled for hearing to provide the complainant with an opportunity to establish by reasonable proof those losses sustained by the union and bargaining unit employees, if any, arising from the loss of opportunity to negotiate on the matter of the plant closing together with interest as appropriate. This decision relates to that remedy. The complainant is seeking the following relief:

- a "make whole" order to provide bargaining unit members improved severance payments, improved pension and life insurance benefits, extension of welfare benefits, and relocation, retraining, and preferential hiring rights at other plants of the respondent;
- in the alternative, an order directing the respondent to make whatever payments are necessary to ensure that the bargaining unit employees receive the same severance and/or termination benefits which were granted to employees and/or persons outside the bargaining unit;
- an order directing the respondent to compensate the complainant for all legal costs incurred as a result of the respondent's illegal conduct.

2. This matter arises out of joint negotiations involving the respondent and the complainant and its locals representing employees of the respondent at six of the respondent's plants in Ontario and Quebec. The plants are located at Etobicoke, Hamilton, Whitby, St. Thomas

and at St. Laurent and Montreal East in Quebec. This style of bargaining had been in effect between the parties since approximately 1969. The outcome, however, is not one master agreement but rather six separate collective agreements. The unions conducted their most recent negotiations pursuant to the guidelines applicable in 1980. The 1980 guidelines read:

1. The decision by the local membership to participate in joint negotiations is final and binding up to the point where a final decision is reached by the joint vote referred to below.
2. Any settlement presented to the membership involved will be decided by secret ballot vote. The result of this vote is binding on all participants.
3. When the main agenda has been agreed upon and submitted to the Company, no item can be deleted therefrom without the majority decision of the joint negotiating committee, except in the case where a local membership has instructed its committee that such an item is a major strike issue. Strike issue's are to be identified at the time the guidelines are signed.
4. With the exception of strike issues the joint negotiating committee has full authority to modify or amend main agenda proposal's during negotiation by a majority vote of the committee.
5. When the main agenda is finalized and presented to the Company no items can be added to or substracted therefrom, unless there is a unanimous vote.
6. A representative shall attend all balloting meetings and seal all ballot boxes.
7. The membership involved will take a strike vote on or as close as possible to November 2, 1980.

3. Strike issues are designated as such by the representatives from the local plants and, for the purposes of bargaining, these issues remain strike issues for the other locals unless withdrawn by the local initially designating the issue a strike issue. Mr. Jean-Marie Bedard, Regional Director of the complainant, testified that had the respondent advised all of the locals during bargaining the Hamilton plant was to close the trade unions would have maintained their request for an improvement to the plant closure clause and would have made additional proposals on retraining, relocation, priority on hiring, recall rights, and the inclusion of every employee in the Hamilton pension plan together with an improved pension plan in the area of early retirement. Also of interest would have been prepaid life insurance, OHIP, and weekly indemnity coverage for "some period of time".

4. The provision in the expired collective agreement dealing with plant closure was Articles 18.26 to 18.29. They provided:

18.26 PLANT CLOSURE

In the event of the planned closure of the entire plant, the Company will notify the Union as soon as possible of such plans but in any case not less than two (2) months prior to the closing date.

18.27 Eligible employees terminated as a result of the plant closure will receive severance pay as follows:

(a) An eligible employee with one (1) to ten (10) years of service will receive twenty (20) hours pay for each year of service at the employee's current hourly rate.

(b) An eligible employee with more than ten (10) years of service will receive twenty (20) hours pay for each year of service up to and including ten (10) and forty (40) hours pay for each additional year of service at the employee's current hourly rate to a maximum of one thousand and forty (1,040) hours total severance pay.

18.28 In order to be eligible for severance pay under this Article, employees must be on payroll at the time of the announcement of plant closure, have one or more years of service and remain in the employ of the Company until the closing of the plant or until the employee's services are no longer required. Employees eligible for any early retirement benefits proposed by the Company will be entitled to either the early retirement benefit or the severance pay.

18.29 Employees eligible for severance pay as provided by Government legislation will receive either the Government legislated provision or the Company severance pay provision, whichever is greater.

5. The proposed amendment to which Mr. Bedard referred is found at page 12 and 13 of the union's proposed amendments to the collective agreement. This proposal which was unilaterally withdrawn during bargaining read:

(ix) Section 18.26 Plant Closure

Amend to read:

In the event the Company decides to cease, in whole or in part its operation at the location covered by this agreement, regular employees affected will be given a minimum notice of two months. A regular employee holding seniority rights, whose employment with the company ceases because of plant closure, in whole or in part, will be paid a severance allowance based on the formula of two weeks pay for each year of service or fraction thereof. The allowance will be paid upon severance.

In the event the Company relocated any operation, in whole or in part, the employees so affected shall have the right to exercise full seniority and recall rights in the new location. It is understood that this particular provision shall not apply to any Consolidated-Bathurst operation currently under agreement with the International Woodworkers of America.

Any employee affected by any closure outlined above shall have the right to take a job elsewhere following closure announcement and at the same time, retain his eligibility to all entitled severance pay which shall be paid to him immediately upon his departure.

(NEW) In the event of a lock-out or strike, and the Company decides to close plant, severance pay will be paid.

6. The union bargaining committee consisted of four representatives from each plant for a total of twenty-four union representatives. They were accompanied by three representatives, including Mr. Bedard from the International. Mr. Bedard testified that if the company had not agreed to the union proposals on the plant closure, he and his colleagues would have recommended strike action very strongly to the entire committee. Mr. Bedard believed that a strike would have ensued. Mr. Bedard testified that the company wanted an agreement very badly because of customer uncertainty. Subsequent to the closure, the other locals agreed to share in whatever legal costs were incurred as a result of the legal challenge to the closing. On cross-examination, Mr. Bedard agreed that it was the union that pushed the negotiations into a post-conciliation negotiating mode. He agreed that the trade union did not identify strike issues to the company and that the union took the position that there would be no negotiating until the company removed its proposals from the bargaining table. He also agreed that strike action would take, in accordance with the guidelines, a majority vote of all six plants. He agreed that the respondent was a tough bargainer and had been willing to take strikes in the past, both company-wide and at individual plants. For example, it had locked out the Hamilton bargaining unit in 1978-79 in order to remove the incentive system then in place. During a strike the trade union pays between \$40.00 to \$60.00 in strike pay to each bargaining unit member depending on marital and family status. Mr. Bedard estimated the strike fund in January of 1983 to be approximately \$300,000.00 and that the cost of strike pay would have been approximately \$50,000.00 per week. He suggested that the trade union might have obtained additional financial support from the other trade union's in the industry. But they were just coming off a six month strike during which all of the employees of the respondent worked. Bargaining unit employees of the respondent, however, did provide some support to striking employees at the other companies in the amount of \$10.00 per person per week with the exception of the Quebec locals. Mr. Bedard expressed the opinion that the members of the other plants would have "stood up" for the Hamilton employees. But he acknowledged that the other locals would only accept a priority of hiring at their locations for Hamilton employees only after all employees laid off at those locations were recalled. It was also agreed that Hamilton employees could rely on their company-wide seniority only for the purposes of benefit entitlement. He said that very few employees would forego their own seniority for others. Said Mr. Bedard: "I'm not congratulating them but it's a fact". He acknowledged that 89.9% of the employees voted in favour of the proposed settlement with the company, a settlement adopting the industry pattern. He agreed that Article 18.26 had been in the collective agreement for a number of years, having come about as a result of a closure in Montreal some

twenty years ago. He further agreed that there had been plants closed by Consolidated-Bathurst since that time. He agreed with the company's counsel that Hamilton employees had brought a grievance which successfully challenged the compulsory nature of the company's pension plan at that location. He also produced and identified the complainant's legal costs as of July 5th, 1983 in relation to this matter in the amount of \$12,487.92.

7. Mr. Rudy Oliverio is President of the Hamilton local. He testified that had the complainant been advised of the impending plant closing, job security and contract benefits such as the dental plan, glasses, life insurance, CPP, severance allowances and pension would have become major issues. He testified that only thirty hourly employees were part of the company pension plan. He testified that the trade union would have been looking for benefit coverage for at least the three year period of the collective agreement. He again referred to the age breakdown of the one hundred and seventy bargaining unit employees. Seventeen were between the ages of sixty-one and sixty-four years of age. Fifty-eight were between the ages of fifty-one to sixty. Forty-four were between the ages of forty-one to fifty. Twenty were between the ages of thirty-one to forty. And thirty-one were between the ages of twenty-one to thirty. In excess of one hundred and ten employees had twenty years of service with the company on closing. Mr. Oliverio testified that of the one hundred and seventy employees, ninety employees were still unemployed. He testified that quite a few of these ninety employees fell within the forty-five to sixty-five years age group. Mr. Oliverio himself is fifty-six years of age and still unemployed. He expressed the opinion that there would have been a strike had the company not made an adequate response to the plight of these older workers during bargaining. He testified that at the very least all of the plants would have struck to cause equal treatment between bargaining unit and non-bargaining unit employees at Hamilton. Severance for salaried employees was on a sliding scale to a 52 week maximum. An employee with twenty-five years service received the maximum. An employee with nineteen years service received 37 weeks severance pay. An employee with fifteen years service received twenty-four weeks severance pay. On cross-examination he agreed he would have felt threatened by an announcement of a plant closure during negotiations but the union would have had to take everything into consideration. He acknowledged that as part of the plant closing employees were given the opportunity to convert their life insurance to whole life without a medical. He agreed that even if all the Hamilton employees voted for a strike there would have had to be an overall majority in favour of strike action for a strike to occur over the Hamilton plant closing. He acknowledged that the company was a very tough negotiator and that the Hamilton employees had been locked out for five weeks in the late 1970's. He explained that he and other union officials signed the collective agreement in April after the plant closing announcement because they felt the memorandum of settlement was final and binding. He acknowledged that the proposal to amend Article 18.26 was a proposal which had been made in a number of earlier rounds of bargaining between the parties.

8. Alan Strickland is President of the Etobicoke local. There are one hundred and seventy employees in that bargaining unit. He was involved in the 1982 negotiations. He said he would have recommended strike action to Etobicoke employees over the Hamilton closing had adequate conditions not been agreed to by the company. The majority of employees in his bargaining unit are considerably younger than the Hamilton employees. He agreed that the pension proposal made on January 5th for a fully paid non-contributory pension plan was eventually dropped by the trade union. He further agreed that a no-contracting out proposal was dropped. He also was aware of the arbitration brought on by Hamilton employees which

succeeded in "knocking out" the company's compulsory contributory pension plan. Nevertheless, he felt that Etobicoke employees would have supported the Hamilton Local. The Etobicoke employees have not struck in the past.

9. John Gray is President of the Whitby local. There are one hundred and eighty employees in that bargaining unit. He was involved in the 1982 negotiations. He believed that the members of his local would have supported the Hamilton employees for a better severance provision and for whatever else might be necessary. The average age of his bargaining unit is lower than that of the Hamilton bargaining unit. The Whitby plant opened in 1956. He acknowledged that the company was a tough negotiator. He also acknowledged that an announcement by the company might have been construed as a bluff or a threat. He said he believed his members would have struck over the matter of the Hamilton closing because any relief achieved would have benefitted the Whitby local "down the road". He acknowledged that after the Hamilton closing was announced the other locals agreed to the movement of Hamilton employees to other plants only if Hamilton seniority was confined to benefit entitlement. There have been three or four strikes at Whitby. He testified that the Hamilton and Whitby locals have always negotiated in the past and have always been ready to support each other.

10. Mr. Verne Warren is President of the St. Thomas local. He testified that the Quebec locals amounted to about 25% of the employees involved in the negotiations. He testified that he would have recommended going on strike to St. Thomas employees in support of achieving at least what the trade union initially proposed as an amendment to Article 18.26. The St. Thomas plant is the newest plant with the average seniority in the bargaining unit in the order of ten years. The Hamilton plant was the original plant in the Bathurst chain. He pointed out that if all of the Hamilton employees bumped into the St. Thomas bargaining unit they would eliminate or bump out all existing St. Thomas employees; hence the limitations on the access of Hamilton employees to jobs at other existing plants. He agreed that most of the St. Thomas employees have voluntarily joined the company's pension plan. He also agreed that St. Thomas employees wanted the industry settlement and there was no other major issue for them. The St. Thomas plant has been on strike before but Mr. Warren agreed that January was not the best month to be on strike. He asserted that the company's demand for a three year agreement "lulled the locals to sleep" on the issues of job security. He testified that raising the Hamilton plant closing at the last minute of the negotiations would have been perceived as bad faith in the sense that he believed the company should have known earlier and should have given fair warning.

11. Walter K. Lopata was employed at the Hamilton plant and a member of the negotiating committee. He acknowledged that "things were tough all over" in April of 1982. The Hamilton plant and all other plants were on a one shift, four day a week basis but the Hamilton local never discussed a plant closure. He testified that Mr. Beettam had been sent to Hamilton to make things better not to close the plant. The major issue at the Hamilton plant was contracting out but this was given up during bargaining. On cross-examination he agreed that an announcement by the company of a plant closing during bargaining would have thrown the negotiating committee into a turmoil. He agreed it was hard to say just what would have been done with the Hamilton local being only one of six locals involved in the bargaining.

12. Mr. Bernard Holmes, Plant Manager at the Etobicoke plant, testified that after the plant closing announcement he advised the President of the Etobicoke local, Mr. Strickland,

that applications for employment had been received from Hamilton employees. He testified that Mr. Strickland replied "We don't want any of these buggers in this plant, we don't want any troublemakers". Mr. Strickland testified that he did have a conversation with Mr. Holmes but denied saying what Mr. Holmes said he stated. Instead, it was Mr. Strickland's evidence that he took the position with Mr. Holmes that employees from Hamilton would have to start at the bottom of the seniority list and would retain their company-wide seniority only for the purposes of benefit entitlement.

13. Mr. Ronald Gruber was the lead company negotiator during the 1982 negotiations. He confirmed that the first day of negotiations was December 15th and negotiations continued on January 4th, 1983. The union's proposals on plant closures had been, he thought, withdrawn by that time. The trade union's proposal on pension plans was made January 5th. He, however, acknowledged some discussion on Article 18.26 with respect to how the *Employment Standards Act* would be integrated into the collective agreement provision, the *Employment Standards Act* providing a greater benefit for an employee with more than five year's seniority. Mr. Gruber testified that the mediators recommended the company make a final offer on January 6th. He consulted his superior Mr. Haiplik who is head of the Container Division. It was decided to make a final offer with a time limit for its acceptance in the full knowledge that if it was not accepted a strike would ensue. The union strike deadline was January 8th. He testified that the settlement with the six locals was on the basis of the industry settlement and its estimated cost was two million a year for all six plants. He explained that the plant closing provision was inferior to the *Employment Standards Act* for an employee with five years or more of service in that the *Employment Standards Act* provides for one week of pay per each year of service up to a maximum of 26 weeks. He was asked by the company's counsel to cost the following damage proposals submitted by the complainant:

- 1- All employees to be paid a severance allowance based on the formula of two weeks pay for each year of service or fraction thereof.
- 2- Life insurance and all other welfare benefits to be maintained during the life of the collective agreement as per 18.30.
- 3- Relocation and training - The Company to give priority to Hamilton employees when hiring in any of its Ontario corrugated plants with the necessary training if required.
- 4- Pensions - Bargaining unit employees shall be entitled to receive early retirement pension benefits payable at age 49 with bridging formula.
- 5- All employees to be provided with a paid up life insurance policy.
- 6- a) Employees age 45 and over shall be entitled to receive their pension contributions upon request;
- b) Pension monies frozen prior to 1962 to be released to employees involved.
- 7- Any improvements resulting from the meeting concerning Pensions as

per the Memorandum of agreement dated January 13th, 1984 shall also apply to Hamilton employees.

- 8- The arbitration case re: probationary employees to be resolved.
- 9- The Union to be re-imbursed for all legal costs incurred resulting from hearings before the Ontario Labour Relations Board and any subsequent hearings that may follow the decision of the Ontario Labour Relations Board.

14. His costing notes took the form of Exhibit 13 which reads:

Severance Pay''

- As Per Union Proposal:	
2 weeks per year of service -	
7203 wks x 40 hrs x \$11.11 =	\$3,201,013.
Less Paid Out	<u>1,534,243.</u>
*Additional Severance	\$1,666,770. +

Fringe Benefits:

- As per Union Proposal: (Dec/82 - \$25,000.)	
* \$300,000/Yr x 4 Yrs =	\$ 900,000.

Paid Up Life Insurance''

- As per Union Proposal:	
\$11.11 avg. rate x 2080 x 2 = \$46,000.	
* \$46,000. x .33¢/mo/thou. x 12 =	\$182.16 x
177 employees =	<u>\$32,240/Yr.</u>
	x 20 yrs.

Relocation:

- As per Union Proposal:	
* Assume 150 relocations at \$2500. @ =	<u>\$375,000.</u>

Early Retirement Same as Salaried

- Triple actual cost= \$465,540 x 3=	\$1,400,000.
Less paid	<u>465,000.</u>
*	\$ 935,000.

- + 2 M already paid
- + Pension for all 2/M
- + Retraining 3,000,000 (1 mo./employee 2000x150)

15. Exhibit 13 totals \$6,742,000.00. He testified that the company clearly would have taken a strike in the face of such a demand over the plant closing given that the total cost of the economic package for all six plants was 6 million dollars. The profits for the year 1982 for Consolidated-Bathurst Inc. were 53.4 million dollars. He agreed with counsel for the trade union that the company would have seriously considered any proposal made by the complainant on the plant closing. He also agreed that it was in the company's interest to "get a deal" and thereby keep its market share and its customers. He testified that he believed 72% of the hourly employees who had availed themselves of the manpower adjustment service in Hamilton since the closing are now employed. However, only one or two of the former Hamilton employees are employed by MacMillan-Bathurst which now owns and operates the remaining five plants. On cross-examination, he testified that the total cost to the company of the severance and pension rights accorded bargaining unit and non-bargaining unit employees was approximately 3 million dollars. Two million was the unionized employees' portion (i.e. one hundred and seventy-seven employees) and the other million was paid out to sixty or seventy salaried or non-bargaining unit employees.

16. In the summer of 1982 the Vice-President and General Manager of the Container Division of Consolidated-Bathurst Packaging Limited was Mr. Theodore Haiplik. Mr. Gruber reported to Mr. Haiplik. Mr. Haiplik testified that the respondent was not prepared to go beyond the economic pattern established by the respondent's competitors after a six month strike. He testified that Mr. Gruber got him out of bed on January 6th to discuss the possibility of putting a final offer to the trade union. He decided to make that final offer as advised by the mediators and face the possible consequence of a strike if the offer was not accepted. He testified that the company would not have been prepared to pay an additional 6 1/2 to 7 million dollars in respect of the Hamilton plant closing. That amount of money was "outside the realm of possibility".

17. Also submitted into evidence were several collective agreements of competitors in the industry. None of the ten agreements contained a provision measurably better than that of Article 18.16 and four of the ten agreements contained no provision relating to a plant closing.

18. On behalf of the trade union it was submitted that the losses sustained by bargaining unit employees were "real and substantial". If the company had disclosed its intent to close the Hamilton plant, counsel submitted, collective bargaining would have been dramatically different. It was stressed that the company wanted an agreement and would have considered the trade union's proposals seriously. It was pointed out that the nature of the respondent's breach of the statute created an inherent uncertainty with respect to the losses sustained by bargaining unit employees and that therefore the respondent ought not to be able to benefit from its own wrong doing by relying on this uncertainty. Counsel submitted that this Board should find, on the balance of probabilities, the union would have achieved significant gains and even if these gains were difficult to assess the Board was obligated to do its best in this respect. Reference was made to *United Steelworkers of America and Radio Shack*, [1979] OLRB Rep. Dec. 1220; *Canada Cement Lafarge Ltd. and United Cement, Lime and Gypsum Workers International Union et al.*, [1981] OLRB Rep. Dec. 1722; *Penvidic Contracting Co.*

Ltd. and International Nickel Co. of Canada Ltd. (1975), 53 D.L.R. (3d) 748 (SCC); *Re Burrard Yarrows Corporation and International Brotherhood of Painters, Local 138* (1981), 30 L.A.C. (2d) 331 (Christie); *Academy of Medicine and Communication Workers of Canada*, [1977] OLRB Rep. Dec. 783; and *Ontario Haulers Association Inc. and Repac Construction and Materials Limited*, [1976] OLRB Rep. Oct. 610. It was submitted that the Board ought to take the monies paid out to salaried employees as the bench mark for the assessment of the appropriate damages. It was further submitted that the Board should take into account the savings to the respondent resulting from the closing of the Hamilton plant.

19. On behalf of the respondent counsel submitted that it was in an impossible situation in early January. It was being pushed to a deadline by the trade union and all witnesses agreed that the announcement of a plant closing would have thrown the negotiations into turmoil. Counsel submitted that the conduct of the trade union in pushing the company to this deadline effectively took away the company's ability to inform the complainant of the closing and for the closing to be discussed in a rational manner. It was further submitted that the possibility of a plant closing should have been known to the complainant and was ignored in order to quickly gain the benefit of the industry settlement. Counsel questioned the sincerity of those trade union officials who testified they would have recommended strike action on the Hamilton closing. He pointed out that the Etobicoke plant had never before struck and that the proposed amendment to Article 18.26 revealed the participating locals were not at one on the manner of dealing with plant closings. Counsel stressed that if the total settlement was in the order of 6 million dollars, the company's position that it would take a strike on a demand for an additional 6 million dollars is obviously believable. It was also pointed out that no other collective agreement in the industry provided a pattern materially in excess of the plant closing formula found in the Hamilton collective agreement. It was also submitted that the announcement of a plant closing, had it precipitated a strike, would have placed the trade unions on a disastrous course. The unions had a very small strike fund; the industry was just coming off a strike; and there was very high unemployment in all regions at the time. Accordingly, it was contended the trade unions and their members would have experienced dramatic losses in attempting to achieve an "impossible goal". The failure of the company to reveal the closing therefore saved the trade union and its members from incurring these losses. From this perspective, counsel contended, only nominal damages were in order. Counsel argued that the breach of the statute was technical in nature and the losses contended by the trade union are entirely too speculative. In this respect the Board was referred to *Re Publishers' Syndicat* (1904), 7 OLR 223; *Canadian Woodmen of the World v. Hooper*, [1935] 2 D.L.R. 802; *Kinkle v. Hyman*, [1939] 4 D.L.R. 1; *TTC v. Acqua Taxi Ltd.* (1956), 6 D.L.R. (2d) 721; *Wyman v. Vancouver Real Estate Board* (1960), 23 D.L.R. (2d) 21; *Grand Restaurant Ltd. v. City of Toronto* (1981), 123 D.L.R. (3d) 349; and *Bowlay Logging Ltd. v. Domtar Ltd.* (1982), 135 D.L.R. (3d) 179. Reference was also made to *Journal Publishing Company*, [1977] OLRB Rep. June 309; *Foto-Mat Canada Ltd.*, [1982] OLRB Rep. July 1020; and *Globe Spring and Cushion Ltd.*, [1982] OLRB Rep. Sept. 1303. It was also submitted that this was not an appropriate case for legal fees; that the salaried employees were governed by a different legal regime; and that the Hamilton employees have consistently shown a disregard for their economic future as evidenced by their attack on the pension plan through the arbitration process. Counsel contended and stressed that the trade unions had substantially contributed to the situation by failing to ask questions in bargaining about possible plant closings; by pressing the company for a quick settlement; and by ignoring the earlier economic indications of potential plant closings.

20. In *Radio Shack*, *supra*, at paragraphs 101-112 and 115 the Board had the following to say about assessing the loss of opportunity to negotiate a collective agreement when that loss was occasioned by a breach of the Act:

101. It can, of course, be argued that damages for the loss of such an opportunity are too speculative to estimate and if arbitrarily set would be punitive in nature – a result that would appear to contravene the first tenet discussed. The argument, however, is inconsistent with the long accepted principle that one whose wrongful act precludes the exact determination of damage should not be able to evade his duty to compensate for that damage because of an uncertainty caused by his own wrongdoing. See *Mayne and McGregor on Damages* 12th ed., 1961, para. 174. In private litigation before our courts, a party is not burdened with an unattainable standard of accuracy in the assessment of damages. Business losses in commercial law suits and the compensation awarded in personal injury cases to persons who may never have been employed are important examples. See for example: *Withers v. General Theatre Corporation*, [1933] 2 K.B. 536; *Roach v. Yates*, [1938] 1 K.B. 256 (C.A.). Even more directly in point are those cases that explicitly grapple with the wrongful loss of an economic opportunity.

102. *Chaplin v. Hicks*, [1911] 2 K.B. 786 (CA) first recognized the principle of compensating for the loss of an opportunity in the context of a beauty contest. The case involved a breach of contract to enter a contest from which the loss of opportunity to win a prize flowed. In determining whether the breach of contract resulted in injury to the plaintiff, Lord Justice Fletcher Moulton, at 795 commented:

“Is expulsion from a limited class of competitors an injury? To my mind there can be only one answer to that question; it is an injury and may be a very substantial one. Therefore the plaintiff starts with an unchallengeable case of injury and the damages given in respect of it should be equivalent to the loss.”

103. A similar situation arose in *Domine v. Grimsdall*, [1937] 2 All E.R. 119 where a plaintiff recovered £15 from a defendant bailiff who had improperly failed to execute judgment against a debtor of the plaintiff, the loss of chance being that the debtor would pay off his debt to avoid the execution against his goods.

104. In *Hall v. Meyrick*, [1957] 2 Q.B. 455 a solicitor negligently failed to warn the plaintiff that her marriage would revoke a will made in her favour by her intended husband. The damage she suffered as a result of this negligence was the loss of opportunity to secure the benefits of a new will. However, in valuing the opportunity Ashworth, J. at 471 noted that, “[T]he more the contingencies the lower the value of the chance or opportunity of which the plaintiff was deprived.” The damages awarded were £1250.

105. The Supreme Court of Canada approved this principle in *Kenkel et al. v. Hyman et al.*, [1939] 4 D.L.R. 1 where the defendant directors had sold the plaintiff's stock in a company without obtaining the consent of 51% of the shareholders for whom it was held in trust. The plaintiff had resold stock to the defendants for an option to repurchase provided that the defendant directors called a meeting of the shareholders to ratify the first transaction. The defendants failed to call a meeting within the life of the option. The court found a breach of contract, but awarded only nominal damages as there was no proof that the shareholders would have ratified. At page 7 Mister Justice Crockett observed:

“For my part I can find no authority in either *Chaplin v. Hicks* or *Carson v. Willitts* justifying any Court in awarding any more than a nominal sum as damages for the loss of a mere chance of possible benefit *except upon evidence proving that there was some reasonable probability of the plaintiff realizing therefrom an advantage of some real substantial monetary value.*”

[Emphasis added]

106. In the B.C. Supreme Court case of *Hornak v. Paterson et al* (1967), 62 D.L.R. (2d) 290, the plaintiff established a breach of contract by the defendant union in failing to notify him of an employment opportunity. Damages were awarded for the lost wages of the particular job in question but were not awarded for the loss of opportunity for future employment, again because of lack of proof of the opportunity materializing. In discussing the onus of proof Mister Justice Aikins, at 298, had this to say:

“In my view before damages may be awarded for the loss of a chance the existence of the chance said to have been lost must be established in accordance with the usual requirement in a civil case, that is on the balance of probabilities. The proof is insufficient if it is left as a matter of conjecture whether there was a loss of a chance or not. This simply means that there must be acceptable evidence showing directly that there was the chance claimed or leading to the same conclusion by reasonable inference.”

107. *McWhirter v. University of Alberta* (1978), 7 A.R. 376; 80 D.L.R. (3d) 609 is another and very recent case involving this issue. A professor alleged that the University had failed to follow certification procedures set out in the University of Alberta Faculty Handbook when considering him for tenure. As a result, he lost the chance to be considered the following year for tenure. The Court assessed damages for breach of contract at \$12,000 which reflected the chance of success in the new hearing and the likelihood he would have been accepted and have remained at the University in any event.

108. American cases have also adopted this principle. In *Kansas City, M. & O.R. Co. v. Bell*, 197 S.W. 322, the defendant delayed a shipment of pedigree hogs in breach of contract. The plaintiff recovered as damages the value of the chance to win the amount of the price he claimed he would have won at the stock show in which he missed entering his pigs. Boyce, J. discusses how the chance would be valued:

“Evidence as to all such matters as would tend to show the probability that the plaintiff would be successful in the competition would be admissible, and, as one of the judges in the English case says, it would then be left to the good sense of the jury trying the case to determine the value of the plaintiff’s chance on the competition.”

109. Similarly in *Wactel v. National Alfalfa Journal Co.*, 176 N.W. 801, a contestant in a magazine subscription contest recovered the value of the chance to win where the defendant wrongfully declared the contest abandoned in the plaintiff’s district.

110. More recent cases valuing the losses sustained in the breach of vacation contracts are further examples of the willingness of the courts to provide effective relief for the violation of private rights. See *Jarvis v. Swans Tours Ltd.*, [1973] 1 All E.R. 71 (C.A.).

111. If the courts have not shied away from attempting to provide effective monetary relief for the violation of private rights, should the Ontario Labour Relations Board be any less sensitive when confronted with the intentional defiance of statutory policy? The answer must surely be in the negative unless this approach conflicts fundamentally with more important principles and we do not think this is the case.

112. A general damage award to all of the employees in the bargaining unit of the kind we have in mind, would not amount to the dictation of contract terms. Rather, it acknowledges that the wrong the Board is addressing is not the denial of a right to a particular collective agreement, but rather the right to bargain collectively in pursuit of such a contract. Thus, it is the prospects of the employees of increased earnings from the exercise of the trade union’s bargaining capacity in negotiations which have been impaired by the employer’s wrongful acts and refusal to engage in collective bargaining. It is therefore this “loss” – the bargaining expectancy – that must be assessed. Never having tried to value this loss, we are unable and unwilling to conclude that such losses cannot be established from relevant and statistically meaningful material available to the parties. The law of damages has recognized as probative the experience of others similarly employed and, with the plethora of collective bargaining data available to the parties, it would not seem rash to think that reasoned argument can be made on this issue too. Indeed, at least one American statute specifically provides for such an approach. See *California Labor Relations Act of 1975*, incorporated as Part 3.5 (sections 1.40 to 1166.3) of Division II of the California Labor Code. Also see

Yates, *The "Make Whole" Remedy for Employer Refusal to Bargain: Early Experienced Under the California Agricultural Labor Relations Act* (1978) 29 Lab.L.J. 666.

115. We are sensitive that too arbitrary an approach to this kind of monetary loss might have the effect of unduly burdening employers and, accordingly, we embark on this new direction with caution. However, if we make no effort to chart this course, employees and trade unions will continue always to bear the loss. The fear of over compensation, in many contexts, has all too often resulted in no compensation with iniquitous results. To a very real extent, bargaining orders simply direct an employer to do what was originally required except that by virtue of the unlawful conduct the employer may have weakened the bargaining position of the union and thereby strengthened his own position. If awarding employees compensation for economic losses established by reasonable proof has the incidental effect of making such misconduct less attractive, it would be unduly restrictive to rule out this more effective remedy because of the incidental deterrent effect. Clearly, the preamble to the Act demands this Board to devise a compensatory remedy where this is at all possible. See Note, *The Need for Creative Orders Under Section 10(c) of the NLRA* (1963), 112 U.Pa.L.Rev.69.

21. In *Canada Cement Lafarge Ltd.*, *supra*, at paragraph 32 the Board noted that, while common law damage assessment principles provide helpful analogies, remedies had to draw their purpose from the *Labour Relations Act* and distinctive labour relations policy considerations. In this respect, the Board wrote:

Earlier in this opinion we said that compensation awarded under section 89 and the other remedial provisions should draw its purpose from the *Labour Relations Act* and the particular substantive provisions in issue. Principles of damage assessment developed in contract and tort law may provide useful analogies but, in the final analysis, labour law principles must prevail. Legal concepts such as "reasonable foreseeability", "causation" or "remoteness" all tend to reflect the aims of either contract law or tort law. When studied carefully, they amount to formulae by which loss and risk are allocated in light of what contract and tort law are trying to accomplish. In essence, they amount to policy determinations in particular cases. Professor Swinton, in her very learned article, has observed:

Fuller and Perdue, in their classic article "The Reliance Interest in Contract Damages", noted that it is just as important to decide where to stop in the enforcement of promises as it is to decide where to begin in that process. Should the defaulting promisor be required to compensate the promisee for all the losses caused by his failure to perform (leaving aside for the moment any debate over the flexibility of the concept of causation)? Or should he be protected to some degree from liability which could be a crushing burden out of all proportion to the benefit which he expected to receive under the contract?

Should the taxi driver who promises to deliver the business tycoon to his plane on time be liable for the loss of a lucrative deal because he gets tied up in a traffic jam? Should a manufacturer supplying sub-standard cloth to a company making shirts be liable for the loss of future orders from customers dissatisfied with the product?

Courts have had to make difficult decisions in assessing where to stop in the enforcement of contracts. They may purport to adhere to the general principle that the innocent party should be placed in the position in which he would have been had the contract been performed, yet invariably they invoke doctrines which place some limit on the defaulting party's liability; certainty, causation, mitigation, or foreseeability. The focus of this study is the last of these four doctrines, that of foreseeability.

And dealing specifically with the doctrine of foreseeability, she writes:

Even if the foreseeability rule is a justifiable one, its application in the courts has not always been satisfactory. This flows largely from the judicial failure to acknowledge that the "rule" is really little more than a statement of general principle. The decision to find certain types of losses foreseeable and not others is the result of a conscious policy decision to protect certain interests. Such decisions require elaboration and exploration, yet too frequently the application of the foreseeability rule is treated as an exercise in fact determination, and any efforts to elaborate reasons have focussed on an exegesis of the words in *Hadley v. Baxendale*. Judges and commentators have made valiant attempts to articulate the precise degree of foreseeability required in order that damages for breach of contract be compensable, yet the products of their efforts are frustrating in their abstraction. Canadian courts on the whole have tended to adopt the developments and elaborations in the English courts. Thus, resort has been made to the range of cases from *Victoria Laundry* to *H. Parsons (Livestock) Ltd. v. Uttley Ingham Ltd.*, which have struggled with the meaning of damages expected "reasonably" to arise naturally or damages "reasonably" within the contemplation of the parties expected to arise as the "probable" result of the breach. Does this mean that a reasonable man must foresee that a loss was "likely to result," "liable to result," a "serious possibility," a "real danger" or "on the cards"? Do any of these tests really help in allocating loss? Lord Asquith's efforts to explain *Hadley v. Baxendale* in the *Victoria Laundry* case caused some consternation in the House of Lords in the *Heron II* case, particularly with regard to the phrase "on the cards." As a result, the various Law Lords tried to elaborate their versions of foreseeability, with Lord Reid strenuously trying to avoid imposition of liability in contract law as wide as that in tort law and each of the judgements making an effort to describe the proper degree of foreseeability. Similarly, in the *H. Parsons (Livestock)* case, Lord

Scarman tried to describe what would be a “serious possibility” at the time of contracting.

The striking characteristic of all of these judicial efforts to deal with the foreseeability test is their lack of practical assistance in determining whether any particular loss was or was not foreseeable “on the facts of this case.” One has only to refer to the extensive discussion of the rule of foreseeability in damages in Reid’s judgement in the *Heron II* case followed by an extremely brief and conclusory application to the facts of the case for a striking example. A strictly legal or mechanistic analysis of the rule is inadequate to aid in the determination of the proper scope of liability in a given case. Judges are not undertaking a factual determination on the basis of the rule (or rules) described above. They are making important determinations as to who should bear a loss which has resulted from the breach of a contract. In doing so, they may be adapting the concept of foreseeability at times to meet changing circumstances.

See Katherin Swinton, *Foreseeability: Where Should The Award of Contract Damages Cease?*, found in Reiter and Swan, *Studies in Contract Law* (1980).

Tort law’s grappling over the years with economic loss is a classic illustration of how loss allocation principles are, in effect, policy determinations grounded in the purposes of a particular field of law. See Linden, *Canadian Tort Law* (1977), p.367. Labour law can be no different. Indeed, damage cases have already begun to emphasize distinctive labour relations policy considerations.

22. We have carefully reviewed the evidence and the able submissions of counsel and have concluded that the complainant and grievors sustained real and substantial losses as a result of the respondent’s failure to disclose during bargaining that the Hamilton plant would be closed. The closing of the Hamilton plant and its impact on the affected employees could only have provoked an emotional response from all the other locals and employees participating in the negotiations. The effects of closing would have presented a strong psychological claim by Hamilton employees for support from their fellow trade unionists. As well, we think it very unlikely that a “standpat” response from the respondent would have been accepted by the locals given that the enriched severance pay proposal had been made during numerous previous rounds of bargaining. It is more likely than not that such a stance would have provoked a strike of employees. Furthermore, while a strike would have been difficult for the employees, the respondent would not have looked favourably on this prospect either. It wished a collective agreement quickly to maintain its own markets. Its competitors were commencing operations and would have been more than willing to service the respondent’s customers. Nor would prolonged labour conflict have made its discussions with MacMillan Bloedel any easier. Finally, the closing of the Hamilton plant presented the respondent with some savings. There was the breakup value of the Hamilton plant and the fact that the three year labour settlement did not have to be applied to the Hamilton employees. The industry pattern on wages would not have been challenged by the complainant’s claim for relief for the Hamilton employees and, therefore, being willing to take a strike in response to a demand in excess of the industry

pattern does not tell a great deal about the respondents likely approach to the plant closing. We therefore find it more likely than not that the complainant would have achieved some greater relief for affected Hamilton employees than was contained in the collective agreement actually negotiated.

23. Assessing just how much additional relief, however, requires a review of a number of balancing factors. We think it entirely unlikely that a plant closing proposal in the order of six million dollars would have been achieved. The respondent would have been most reluctant to establish a pattern for future closings it could not afford or that would prevent it from achieving necessary adjustments. The industry pattern and this trade union's own history of dealing with plant closing issues would also have created a natural resistance in the respondent. If the six locals were forced to strike, employees would have had to incur considerable wage losses to achieve their aims. In the case of Hamilton employees, this result would have been self-defeating at least to some degree. Support by fellow employees at other locals would, over the course of a strike, depend on the reasonableness of the demands being made by Hamilton employees. Indeed, the support of the Quebec locals was not attested to before this Board and the statement made by Mr. Strickland to Mr. Holmes could cause one even to question the support that would be forthcoming from the Ontario locals. Also of relevance is the failure of the complainant to pursue an improvement to the existing provision. The new contract was for three years and, given the economic state of the industry, the prospect of a plant closing sometime during the three years could not be lightly ignored. The willingness of the locals to submit this prospect to the existing plant closure provision gives some indication of how they assess this type of event. Finally, there is the response of the Hamilton employees to the respondent's earlier attempt to put a pension plan in place. The claim for pension relief in the instant matter strikes one as belated enlightenment and not particularly persuasive.

24. Balancing all these considerations, we find it more likely than not that negotiations on the plant closing would ultimately have focussed on improved severance payments and priority of hiring demands. We further find it more probable than not that the severance negotiations would have turned from the union's historical demand to a demand for equal treatment with the salaried staff. The severance entitlement of salaried staff would have constituted a natural internal bench mark as events after the announcement unfolded and questions were asked about the treatment to be accorded to other employees. On the other hand, the respondent would likely have taken the position that its policy in respect of non-unionized employees was based on its assessment of common law requirements and that the approach was not relevant to its unionized staff. Therefore, it would have resisted the demand and, thus, an additional complication would have been added to the complainant achieving the relief it sought. Assessing all of these considerations, we believe a discount of 75% should be applied to the difference between what a grievor actually recovered and what he or she would have recovered under the policy applied to non-bargaining unit employees. In other words, we assess the loss of the grievors at 25% of the difference between these two approaches to the closing and direct the respondent to pay this amount to each of the grievors.

25. We also find that it is more likely than not that the complainant would have achieved some form of access for Hamilton employees to new jobs at other Ontario locations of the respondent subject to the prior claim of employees laid off at these locations and awaiting recall. The Hamilton employees are long service employees specialized in the corrugated box industry. They have a strong interest in following the work from their plant and, therefore,

in new jobs that might be created or subsequently arise at the remaining locations. Taking all these considerations into account and, subject to the prior recall rights of employees at other locations, we direct the respondent for a period of one year from the issuance of this decision to offer in order of seniority new positions at its other Ontario plants to those grievors who refrain from immediately taking the money benefit flowing from this decision and register their interest for job offers through the complainant with the respondent. Such grievors will also be accorded a three month training period on the acceptance of a job offer. Should a grievor not be able to perform the job after the training period, he will be paid his monetary entitlement under this decision on his termination. Furthermore, should a grievor take a job at another Ontario location of the respondent and is subsequently terminated for a reason other than his own conduct within a year of hiring, he shall be paid his monetary entitlement under this decision on termination. Grievors who obtain jobs will retain their past service only for the purposes of benefit entitlement and may not exercise such service on a competitive basis against employees with greater service at the new locations. All grievors who register an interest for priority of hiring at other Ontario plants of the respondent and who do not gain a job at these other plants during the one year period shall be paid their monetary entitlement under the decision at the expiration of the period. Any employee who registers an interest may, during the year period, elect to take his monetary entitlement under this decision and, in so doing, waives any further consideration for priority of hiring by the respondent.

26. Having regard to all of the circumstances and to the Board's policy of not awarding legal costs, no other remedy is warranted.

27. We retain jurisdiction to resolve all difficulties encountered in the implementation of the remedies and to determine specifically the monies owing each grievor should the parties be unable to agree on same.

DISSENTING OPINION OF BOARD MEMBER W. H. WIGHTMAN;

1. Having dissented on the earlier decision, I could only have joined with the majority in this matter had the decision been to award nominal damages in the amount of one dollar.

2. As with the earlier case, my first concern has to do with the practical implications of the decision for collective bargaining. While "equal treatment with the salaried staff" may be a convenient point of reference for the majority of the Board to use retrospectively, it should be noted that at the time of bargaining the treatment to be accorded salaried employees was not known to the union. If, to use the words of the majority in the earlier decision (para. 53), "the impending closing was so concrete and highly probable (at the time of bargaining that) the company had a minimum obligation to (disclose)", are we to take it from this decision that the company also had an obligation to make and disclose a firm decision as to the treatment which would *prospectively* be accorded salaried staff in order that the union might have a target at which to shoot? If so, would the company not have been tempted to offer a less generous target? As one of its "signals" to the labour/management community is it the wish of the Board to signal that, as a matter of public policy, we encourage less generous treatment of persons who do not come under the ambit of the collective agreement or, in some cases, the *Labour Relations Act*?

3. As was pointed out by counsel for the respondent, salaried employees come under a different legal regime. They have not erected barriers such as to prevent the movement and

integration of affected employees to other company locations as have the several bargaining units. Over the years they "negotiated" one-on-one with the company on the basis of their individual merit as opposed to collective clout and are entitled to expect no less than that the company would bear this in mind in determining their terms of separation. The company appears to have done this and, in so doing, has merely indicated it sees no compelling reason to equate those whose salary and other benefit improvements over the years were based on merit should be equated with those who choose to extract their gains on the basis of threats of economic sanctions.

4. This matter illustrates differences between theoretical models of collective bargaining and the actual process. Those who choose to be represented collectively in dealings with their employer must recognize the limitations inherent in the process. One of those limitations is considerable inflexibility in terms of rewarding individual merit. Instead, by its very nature, collective bargaining puts a premium on mediocrity as the price for collective power.

5. The bargaining process is not a search for truth or equity nor can its essential nature, that of a test of relative economic strength, be altered to any significant degree. It persists because people who believe in democratic principles cannot conceive that a society presuming to describe itself as democratic would not allow for collective withdrawal of services in support of interest claims in at least some sectors of the economy and under defined circumstances.

6. *Westinghouse Canada Limited*, [1980] OLRB Rep. Apr. 577 and the instant case represent attempts to alter that essential nature of collective bargaining. However, one suspects that the result will be not unlike the *Employment Standards Act* provisions regarding group lay-offs which have encouraged employers in some sectors to give periodic notices of lay-off as a matter of routine. This is done as a safeguard against the increased severance pay for which they would be liable. One suspects that this decision may lead to an added step in the negotiation ritual. It will consist of routine notice to the union at the commencement of negotiations to the effect that the plant "may close or suffer a substantial lay-off during the term of our next agreement". I describe the notice in these terms because the possibility of business reversals is inherent in any economic system and implicit in negotiations with unions, suppliers, shareowners or anyone else with whom any business deals.

7. Such disclosure will, I suspect be treated with no more gravity than when, on a number of occasions, the company attempted to inject economic realities into its dealings with this union. Not only did the union treat such information and the issue of severance pay provisions with disdain, it went to some lengths to frustrate the company effort to provide a pension plan. It is stating the obvious to argue that the authors of so much of this misfortune were the union negotiators.

8. I cannot conclude without reflecting on the "I'm alright Jack" attitude in the approach taken by the union in negotiating plant seniority clauses which effectively bar the movement of long service employees from one plant to another except at the price of relinquishing all their seniority rights. By way of contrast, I would point to the recent Board decision in *Dufferin Concrete Products*, [1983] OLRB Rep. Dec. 2014. That case involved two separate locals of the same union. As a result of a business decision to merge operations, one of the two locals disappeared. At a higher level of the union organization it was decided that members with ten or more years of service at the operation which was closing would merge

into the seniority list at the continuing operation. This "formula" may have been arbitrary. It was in the eyes of some members with less seniority who brought charges against the union. Nevertheless, the decision suggested that the union considered that its responsibility to its membership was to be viewed at both a local level as well as in a broader regional or national context.

9. Surely a union representing employees in an ailing industry and faced with the prospect of plant closures would see it as part of its duty of fair representation to attempt to make special provision for long service employees in multi-plant operations. It seems unreasonable to me that responsibility should rest solely with employers (as imposed by legislation or negotiated provisions) and the community (as reflected in tax-supported programs such as transitional adjustment payments, relocation allowances and unemployment insurance benefits).

10. The award falls short of the estimated \$6.7 million demanded by the union, and justifiably so in light of the union's conduct, but linked as it is to a formula which would not have been known to the Company (even if they had known of an obligation to disclose) I fail to see the justice to the Company. Nor do I see it making a positive contribution to labour/management relations in the future.

11. I would have awarded nominal damages.

2500-83-U; 2501-83-U Canadian Union of Public Employees and its Local 1854, Applicant/Complainant, v. Country Place Nursing Homes Limited, Respondent

Arbitration – Consent to Prosecute – Practice and Procedure – Unfair Labour Practice – Alleged unlawful sub-contracting also forming subject of grievances – Arbitration process set in motion – Board indicating consent unlikely for prosecution and adjourning consent application – Differing to arbitration in circumstances

BEFORE: R. O. MacDowell, Vice-Chairman, and Board Members W. H. Wightman and S. Cooke.

APPEARANCES: *W. Brown and Bruce Land for the applicant/complainant; James E. Bowden and John Fedyna for the respondent.*

DECISION OF THE BOARD; March 12, 1984

1. The name of the respondent is amended to read: "Country Place Nursing Homes Limited".

2. This is an unfair labour practice complaint filed under section 89 of the *Labour Relations Act* which was scheduled for hearing together with a related application for consent to prosecute the respondent employer for alleged breaches of the Act. Both proceedings came on for hearing before the Board on Thursday, March 1, 1984.

3. The details of the unfair labour practice allegations need not be set out here. It suffices to say that the dispute arises from the reorganization of certain aspects of the respondent's business. The union claims that the steps taken by the employer were contrary to both the *Labour Relations Act* and a collective agreement by which the employer is bound. In this latter regard, grievances were filed in December, 1983 and January, 1984. These grievances were not settled in the grievance procedure and, at the time of the hearing before this Board, were working their way through the arbitration process. Fifteen related grievances respecting the rescheduling of employees' working hours were to be considered by an arbitrator on Tuesday, March 6, 1984, i.e. only two working days after the initial hearing before this Board. For the other two grievances, nominees had been selected and those nominees were in the process of choosing a mutually acceptable chairman for the arbitration board. There was nothing before the Board to indicate that this process could not be completed relatively quickly so that, in accordance with the terms of the collective agreement, there could be an arbitrated resolution of this dispute as well. The Board also notes that the underlying problem – the employer's effort to change its method of operation or use outside subcontractors – has been the subject of the parties' current round of negotiations. This collective bargaining impasse will ultimately come before an interest arbitrator appointed pursuant to the *Hospital Labour Disputes Arbitration Act*.

4. The union concedes that there is a substantial overlap between the issues in the arbitration proceedings and the unfair labour practice complaint. In both cases a key element is the interpretation of the parties' collective agreement and the extent to which it might restrict the way in which the respondent now seeks to organize its business. The union also concedes that the evidence it would lead and the remedies it would seek would be substantially similar. Finally, since the arbitration process is now well in motion, if the Board takes jurisdiction as well, there is a real likelihood of two parallel proceedings, in different forums but involving similar evidence, issues, arguments, and remedies. Whatever the legal propriety of such dual proceedings, they would make no practical sense and would only serve to exacerbate the already difficult relationship between the parties.

5. Now, there is no doubt that it is the Labour Relations Board that is charged with the responsibility for administering the *Labour Relations Act* and the important rights it confers on employees. The Board's statutory powers, remedial authority, and experience adjudicating unfair labour practice cases are all superior to what may be found in a more private arbitration process where adjudicators are paid and selected by the parties. An arbitrator is unlikely to have the sensitivity to the statutory issues which this Board has necessarily acquired through its specialized experience with this statute. Nor is it intuitively obvious why an aggrieved employee should have to pay for the vindication of his statutory rights. On the other hand, the arbitration process is also rooted in the statute and it is conceded that in this case the resolution of the contractual issues is congruent with the resolution of the unfair labour practice complaint. There are no key provisions of the Act which require important elaboration, and no reason to believe that the arbitration process will not yield a binding decision with reasonable promptness. On the contrary, it appears that these problems can be put before an arbitrator at least as quickly as this Board could deal with them, and, it would certainly make no sense to have litigation proceeding simultaneously in two forums.

6. Having regard to the foregoing, we are not satisfied that, *at this time*, the Board should inquire into the complainant's unfair labour practice allegations. Rather, we are satisfied that this is an appropriate case to defer to arbitration. In accordance with the Board's

usual practice in such matters, the Board will, however, retain jurisdiction in order to ensure that the matter does come before a board of arbitration with reasonable expedition and that the outcome of arbitration is neither repugnant to the purposes of the Act, nor remedially inadequate (see generally: *Valdi Inc.*, [1980] OLRB Rep. Aug. 1254).

7. We are satisfied that the consent to prosecute application should be adjourned as well. Prosecution is a quasi-criminal remedy available only with the consent of the Board. Such consent has seldom been granted in recent years and probably would not be granted unless the Board was satisfied that the remedies available to the union under section 89 were insufficient or there were some compelling public policy considerations. Moreover, it appears that the union seeks to prosecute the employer for its failure to meet "forthwith" following a Board order to that effect issued on February 23, 1983; yet, the union did not complain about this alleged non-compliance with a Board direction for more than a year. It did not seek enforcement of the Board's determination under section 89(6) of the Act, as it might have done, and given the six-month limitation for prosecutions, it is difficult to see how the union can now invoke that process even if the Board were disposed to grant its consent.

2498-83-U Labourers' International Union of North America, Local 183, Complainant, v. **Curtis Property Management Ltd.**, Respondent

Duty to Bargain in Good Faith – Interference in Trade Unions – Unfair Labour Practice – Company acquiring two apartment buildings and appointing new manager – Commencing review of whole operation prior to union's arrival – Giving union notice of intention to contract out clearing work – Incumbent on union to pursue matter at negotiations – Tabling by company of wage rate for cleaners not misleading – No bad faith bargaining – Contract out not motivated by anti-union animus

BEFORE: Kevin M. Burkett, Alternate Chairman and Board Members F. W. Murray and B. L. Armstrong.

APPEARANCES: *Roger Aveling for the applicant; Z. Tress, G. Mintzberg and M. Contini for the respondent.*

DECISION OF THE BOARD; March 27, 1984

1. This is a complaint filed under section 89 of the *Labour Relations Act* alleging a violation of sections 15, 64, 66 and 79 of the Act. Section 79 was not relied upon before the Board and there is no evidence of a "freeze" violation.

2. The facts, as proven in evidence, are as follows:

- The purchase by Curtis Property Management of two adjacent apartment buildings at 221 and 265 Balliol Street, Toronto, closed on June 27, 1983. Curtis owns four other apartment buildings in Metropolitan Toronto.

- Mr. G. Mintzberg was hired as general manager of Curtis Property Management effective July 1, 1983.
- Mr. Mintzberg commenced a review of all facets of Curtis' business at that time. He met with the resident superintendents of the buildings on Balliol Street in early July, informed them that "everything about the buildings was going under review", and indicated that no one's job was guaranteed.
- Mr. Tress, the president of Curtis, suggested to Mr. Mintzberg in late July that the feasibility of using contractors to clean and maintain its properties be explored. Mr. Mintzberg testified that other aspects of the general review took precedence and coupled with Jewish holidays prevented the company from obtaining quotes until October and November.
- The complainant trade union was certified as bargaining agent for the employees of Curtis at 221 and 265 Balliol Street on September 15, 1983. Notice to bargain was sent to the company on September 26, 1983.
- Curtis received the notice to bargain on October 3, 1983 and Mr. Mintzberg notified Mr. Tony Spada, the union business representative, that the company was in the process of moving its offices and would be unavailable to meet for "a couple of weeks." Mr. Spada said he understood but applied for conciliation services which were granted on October 19, 1983. Mr. Mintzberg and Mr. Spada did not speak between October 3rd and October 19th.
- The parties met to bargain on November 15, 1983. The company received the union's proposals for a collective agreement and arrangements were made to meet again in mid-January.
- Curtis received quotations from two outside cleaning firms. M. S. Maintenance Systems Inc. quoted an all-inclusive price of \$3,600 per month to clean the two Balloil Street apartment buildings. It was costing Curtis \$4,700 per month (including labour supplies and materials) to clean these buildings.
- Curtis notified the union by letter dated December 20, 1983 of its decision to contract out the cleaning work at the two Balloil Street buildings. The letter reads:

As you may be aware, our company purchased the building at 221 and 265 Balliol Street just prior to the Application for Certification brought by your union. Since the time of our acquisition, we have been reviewing the manner in which these buildings have been operated and managed and have been considering changes which might improve efficiencies in this regard.

Our analysis indicates that our present cleaning costs for the two buildings are between \$4,400.00 and \$4,600.00 per month. On the other hand we have been advised by an outside contractor that we can get the same cleaning work done for both buildings for \$3,650.00 per month.

As a result, we have decided to contract this cleaning work out.

Because of its significance, we wished to bring this matter to your attention prior to our meeting scheduled for January.

- Mr. Spada, who was on vacation during the latter part of December, did not respond to this letter. No one from the complainant union responded. The affected employees were given notice of termination dated January 27, 1984 with the last one to be effective March 23, 1984.
- Curtis decided not to utilize cleaning contractors at its other properties explaining that it would have been required to maintain in its employ the assistant superintendents who work at these other buildings (and provide relief for the resident superintendent) even if contractors were employed. There are no assistant superintendents at either of the Balliol Street buildings. Because the Balliol Street buildings are adjacent to one another and because there is an office staffed by a clerical employee in one of these buildings (who receives and records the rental payments; a function performed by the resident superintendent at Curtis' other premises) the resident superintendents at the Balliol Street buildings are able to cover for one another.
- Curtis tabled a proposed collective agreement at the negotiation meeting presided over by a provincial mediator on January 15, 1984. The parties agreed on the wage rate for the resident superintendent and the union asked for the 10¢ per hour which the company had designated for Welfare to be put on the wage rate for cleaners. There had been no discussion with respect to the letter of December 20th notifying the union of the company's intention to contract out.
- During the course of the discussions with respect to the wage rate for cleaners, the company reiterated its intention to contract out its cleaning. Mr. Spada, who testified that he had taken from the fact that a wage rate had been proposed by the company for cleaners that the company intended to continue to employ its own cleaners and not contract out, advised the company that the union would be initiating legal proceedings and walked out of the negotiations.
- Mr. Mintzberg testified that the company was surprised when the union did not respond to its letter of December 20, 1983 advising of its intention to contract out the cleaning work. He maintained that the company proposed a wage rate for cleaners because it thought that

the collective agreement had to have a rate for each function in the buildings. He maintained further that the proposed wage rate for cleaners was not intended to constitute an abandonment of its right to contract out.

- This complaint was filed on January 31, 1984 and there has been no bargaining since January 19, 1984.

3. The union, citing *Westinghouse Canada Inc.*, [1982], OLRB Rep. July 1098 and *Sunnycrest Nursing Homes*, [1982] OLRB Rep. Feb. 261, argues that there was a duty on the company under section 15 of the Act to have been honest with the union with respect to its intention to contract out and not to have tabled "notional wage rates" designed to mislead the union. Furthermore, it is the position of the union that the company was required to fully discuss its decision to contract out and its failure to do so constitutes a breach of section 15. Although acknowledging that there is no direct evidence of anti-union motive, the union maintains that it must be inferred from the evidence that the decision of the company to contract out was motivated by a desire to operate union free or, at the very least, to pay lower wage rates for cleaners than those which it would be required to pay under a collective agreement. The union relies on *Westinghouse Canada Inc.*, *supra*, in support of the proposition that if the decision to contract out was even partly motivated or "tainted" by anti-union considerations the implementation of the decision constitutes a breach of sections 64 and 66 of the Act. The union seeks the remedial relief granted in re *Sunnycrest Nursing Homes*, *supra*, that is, reinstatement, an order to return to the bargaining table, the termination of the sub-contract and compensation.

4. The company, relying on the sequence of events as established in evidence, asks the Board to find that there has been no breach of section 15 of the Act. The company points to the letter of December 20, 1983, from Mr. Mintzberg to the union, advising the union of its decision to contract out as constituting timely and complete notice to the union of its intention. The company maintains that from this point forward the onus was on the union to raise the matter if clarification or discussion was sought. The company disputes that in circumstances where a written notice is provided the tabling of a wage schedule can be characterized as an undertaking not to contract out or as an attempt to mislead. In the face of the full and complete proposal tabled by the company on January 19th the subsequent resolution of most of the items in dispute, the preparedness of the company to enter into a collective agreement on that date and the break off of its negotiations by Mr. Spada, the company argues that there has been no breach of section 15 of the Act.

5. The company, also relying on the sequence of events as established in evidence, asks the Board to find that there was no anti-union motive in its decision to contract out. The company argues that it was to be expected that it would review its operations at 221 and 265 Balliol Street immediately after having purchased the properties on June 27th especially in view of the fact that it hired a new general manager at the same time. The company reminds us that the affected employees were told in early July (some two months before the union filed its application for certification) that there was no guarantee of continued job security so that the timing of the company's decision is not suspicious. The company maintains that there was a significant cost saving to it (over \$1,000 per month) in going to contract cleaners and asks the Board to find its motive was purely economic. The company asks the Board not to confuse

this case, where there was full disclosure, with the cases relied on by the union where there was no disclosure of an intention to contract out.

6. We have been persuaded by the submissions of the company. Turning to the issue of anti-union motive. The company, having purchased the properties at 221 and 265 Balliol on June 27, 1983, and having employed a new general manager at the same time, commenced to review those operations in early July, well before the union arrived on the scene. The advice to the employees at that time, therefore, that their job security was not guaranteed, had nothing to do with the advent of the union. The events which subsequently unfolded must be assessed in light of the review that was commenced in July and the notice to employees given at that time. The ultimate decision to contract out resulted in substantial savings to the company; consistent with the objective of the overall review of operations commenced in July. Furthermore, the explanation given by Mr. Mintzberg as to why contractors were retained to clean the Balliol Street buildings and not retained at its other properties is credible. This case is to be contrasted with both the *Westinghouse Canada Inc.* and *Sunnycrest Nursing Homes* cases, *supra*, where the employer failed to disclose his intentions. In this case the company advised the union by letter dated December 20, 1983 of its decision and, as we shall elaborate on later, was prepared to negotiate on this issue and to enter into a collective agreement. Although the timing of the receipt of quotations from contractors, as distinct from the decision to consider contracting out as an alternative, standing alone is suspicious, we have been satisfied on all the evidence that the decision of the company to contract out was not made for anti-union reasons and, therefore, is not in breach of the Act.

7. The union is correct when it asserts that there is a duty on an employer under section 15 of the Act to reveal at bargaining decisions that have been made that may affect the job security of those in the bargaining unit. However, the company advised the union by letter dated December 20, 1983 of its intention to contract out the cleaning at the 221 and 265 Balliol Street buildings. This letter satisfied the requirement to disclose and in the face of that notice the tabling of wage rates for cleaners cannot be seen as an attempt by the company to mislead. It was incumbent upon the union to seek clarification of that notice, if clarification was required, and to fashion an appropriate bargaining response to deal with it. The evidence discloses that the company was prepared to bargain and to conclude a collective agreement on the basis of the terms that were being discussed and that the negotiations terminated when Mr. Spada walked out after being informed that the company remained firm in its intention to contract out. In these circumstances, we are unable to find that the company has breached its duty to bargain in good faith and make every effort to conclude a collective agreement. The bargaining process has been suspended in mid step and it now remains for the parties to return to the bargaining table to complete the process.

8. Having regard to all of the foregoing this complaint is hereby dismissed.

0247-82-R Operative Plasterers and Cement Masons International Association of the United States and Canada, Local Union No. 124, Ottawa/Hull on behalf of all affiliated bargaining agents of the employee bargaining agency, namely the Operative Plasterers and Cement Masons International Association of the United States and Canada; or Provincial Conference of Ontario of the Operative Plasterers and Cement Masons International Association of the United States and Canada, Applicant, v. **Duron Ottawa Ltd.**, Respondent, v. Labourers' International Union of North America, Local 527, Intervener #1, v. Labourers' International Union of North America and Labourers' International Union of North America, Ontario Provincial District Council, Intervener #2

Certification - Practice and Procedure - Reconsideration - Board imposing 6 month bar on unsuccessful applicant - Effect of s. 146(3) to prevent applicant from applying during open period of provincial agreement - Board revoking bar on reconsideration

BEFORE: D. E. Franks, Vice-Chairman, and Board Members W. H. Wightman and H. Kobryn.

DECISION OF THE BOARD; March 7, 1984

1. By a decision dated November 17, 1983 the present application was dismissed following the taking of a representation vote. In that decision, the Board stated:

"The Board will not entertain an application for certification by the applicant with respect to any of the employees of the respondent in the bargaining unit within the period of six months from the date hereof."

The effect of that bar would be to prevent the applicant trade union in the present case from applying for certification until May 18, 1984. Counsel for the applicant has subsequently written to the Board requesting that the bar imposed by the Board in the above paragraph be reconsidered by the Board and removed.

2. The reason for the request by the applicant is as a consequence of section 146(3) which reads:

"Every provincial agreement shall provide for the expiry of the agreement on the 30th day of April calculated biennially from the 30th day of April, 1978."

Accordingly, the only time when a timely application for certification can be made with respect to the collective agreement between the respondent and the interveners is in the two months preceding April 30th, 1984. The effect of the bar then imposed by the Board in its previous decision would thus be to prevent the applicant from applying for certification during the "open" period in 1984.

3. The present application was made on April 30th of 1982. The result of that application was a series of long protracting proceedings which, as noted above, ended with the Board dismissing the application in November of 1983.

4. Counsel for the interveners resists the request for reconsideration by the applicant, and refers to the Board's normal policy of imposing a bar in order to allow the employees a "cooling off" period and that repetitious applications are not in the interest of sound labour relations. We are of the view, however, that neither of these policy reasons are applicable in the present case. We note that this open period is two years later than the last open period. In such circumstances, that is much greater than the normal six month cooling off period nor can any application in the up-coming open period be viewed as repetitious. The mere fact that the proceedings appear to be continuous does not make such an application in itself repetitious.

5. Indeed, we are constrained to note that section 5 of the *Labour Relations Act* which deals with the timeliness of applications for certification preserves the right of employees to be involved in applications for certification, and indeed, other sections of the Act such as section 52(3) protect such open periods. In dealing with collective agreements relating to the industrial, commercial and institutional sector of the construction industry the open periods are prescribed by implication from section 146(3), and it is our view that the Board's normal policy of a six month bar ought not to prevent that open period from commencing.

6. For the foregoing reasons, therefore, the Board revokes the bar set out in paragraph 4 of its decision of November 17, 1983.

1042-83-M Sheet Metal Workers' International Association, Local Union 47, Applicant, v. H. G. Francis and Sons Limited, Respondent

Bargaining Rights – Construction Industry – Construction Industry Grievance – Employer recognizing union as bargaining agent while accreditation applications pending – Recognition excluding bargaining rights in "low-rise" residential work – Exclusion continuing and surviving subsequent issuance of accreditation certificate and signing of residential agreement – Grievance dismissed

BEFORE: N. B. Satterfield, Vice-Chairman and Board Members I. M. Stamp and S. Cooke.

APPEARANCES: *Denis Power, Mike Polowin, Bob Belleville and Ross Mitchell for the applicant; M. G. Horan and Hugh Francis for the respondent.*

DECISION OF THE BOARD; March 26, 1984

1. The applicant has referred a grievance concerning the interpretation, application, administration or alleged violation of a collective agreement to the Board for final and binding arbitration pursuant to section 124 of the *Labour Relations Act*.

• • • • •

3. The grievance alleges that the respondent is bound to the residential collective agreement ("the Residential Agreement") between Local Union 47 of the Sheet Metal Workers' International Association ("Local 47") and The Mechanical Contractors Association of Ottawa (Sheet Metal Division) effective from October 21, 1982 to April 30, 1984. The grievance further alleges that the respondent has violated the residential agreement by failing and refusing to apply it to residential construction projects on which sheet metal workers employed by the respondent have been engaged.

4. The central issue in the grievance is whether the employer is bound to the residential agreement as a result of having granted voluntary recognition to Local 47 on or about September 29, 1972. Clause 2.1 of the Residential Agreement includes the following description of its scope:

2.1 SCOPE, PURPOSE AND INTENT

• • • • •

This Agreement is applicable to Sheet Metal Journeymen and Apprentices working in New Residential [sic] construction of single and double houses, row houses, town houses and apartments of not more than six (6) units. Included are renovations and retrofit of air heating and cooling systems in existing residential accommodations.

• • • • •

It is to be noted that the specific provisions of the Residential Agreement do not apply to all residential construction. Rather, it appears to adopt the provisions of another collective agreement for certain work. This is evident from the note which ends clause 2.1 of the Agreement. It reads as follows:

NOTE: Although high rise apartments are not included in the ICI Sector, the ICI rates of pay and fringe benefits and all other provisions of the ICI Agreement shall prevail for all journeymen and registered apprentices working on apartment houses of more than six (6) units.

The ICI Agreement referred to in the note is the sheet metal workers provincial agreement. Neither the Mechanical Contractors Association Ottawa ("the MCAO") nor Local 47 are parties to the provincial agreement, although Local 47 is a party bound by it. The parties to that agreement are:

the Sheet Metal Workers' International Association and The Ontario Sheet Metal Workers' Conference of the Sheet Metal Workers' International Association, and the Ontario Sheet Metal and Air Handling Group.

5. There is little dispute between the parties about the material facts in this grievance, although there was some conflict in the detailed evidence of some of the witnesses with respect to those facts. Where it was necessary for the Board to resolve conflicts in the evidence

of witnesses, the Board has assessed all of that evidence, the reliability of the witnesses' recollection of events, their ability to relate clearly to the Board the matters and events about which they were testifying, the specificity of their evidence, their ability to resist the influence of self interest and their general demeanour as witnesses.

6. Local 47 and the MCAO have been parties to construction industry collective agreements with respect to sheet metal workers employed by those members of MCAO for whom it was the bargaining agent since at least 1966. Prior to May 1, 1973, the scope clauses of those agreements contained no reference to sectors of the construction industry and purported to apply to all sectors of the industry. Beginning with the collective agreement which by its terms became effective on May 1, 1973, the agreements between Local 47 and the MCAO described their scope with reference to the industrial, commercial and institutional (the "ICI") sector and the residential sector of the construction industry. There were three consecutive agreements with scope clauses so described: May 1, 1973 to April 30, 1975; May 1, 1975 to April 30, 1977; and May 1, 1977 to April 30, 1978. Effective May 1, 1978, the first sheet metal workers provincial agreement came into effect. A provincial agreement by definition is a collective agreement which pertains to the ICI sector of the construction industry, although the parties to a provincial agreement can make specific provisions to have it apply to other sectors. There is no evidence before the Board that the sheet metal workers provincial agreements in effect at the times material to this grievance described their scope to apply outside of the ICI sector. The Board is satisfied, however, on the evidence before it, that those sheet metal contractors who had been bound to the collective agreements between Local 47 and the MCAO continued to apply the terms of the provincial agreement to the construction of high-rise apartment buildings. Indeed, the evidence supports the conclusion that Local 47 and these contractors consistently treated the construction of high-rise apartments as though it was one and the same as ICI construction.

7. When Local 47 and MCAO entered into the Residential Agreement on October 21, 1982, it was the first agreement signed between them since April 30, 1978, the expiry date of the agreement immediately preceding the first sheet metal workers provincial agreement. Local 47 is the exclusive bargaining agent for sheet metal workers employed by the contractors who are bound to the Residential Agreement. As indicated at the outset, Local 47 and the respondent are in dispute over whether the respondent is an employer bound to that Agreement. Local 47 bases its claim that the respondent is bound to the Residential Agreement on the fact that Local 47 was granted voluntary recognition by the respondent on or about September 29, 1972 following which, on February 16, 1973, the MCAO became the accredited employer bargaining agent for all employers for whose employees Local 47 held bargaining rights in the ICI and residential sectors of the construction industry within the geographic area described in the collective agreement which was in force between Local 47 and MCAO from May 10, 1971 to April 30, 1973. That is the same geographic area which is described in the Residential Agreement.

8. The MCAO had filed two applications for accreditation to represent in collective bargaining employers of sheet metal workers for whom Local 47 held bargaining rights. One application was with respect to the ICI sector and the other to the residential sector. Subsequent to their filing, but prior to the Board issuing a certificate to the MCAO, Local 47 and the respondent entered into an agreement on September 29, 1972. The form of their agreement was Local 47's collective agreement with the MCAO. They also signed an addendum bearing the date September 29, 1972 which states that the agreement signed between

them "... does not include Jurisdiction over the domestic or (single home dwellings)". After the April 30, 1973 expiry date of the collective agreement which they signed, no further collective agreement was executed between them. There were, however, the three successive collective agreements referred to above between the MCAO and Local 47 covering the period May 1, 1973 to April 30, 1978 and applying to the ICI and residential sectors of the construction industry.

9. The respondent's construction business includes the installation of plumbing, heating, air conditioning and sprinklers and sheet metal work. It does both new construction and renovation or what the parties referred to as "retrofitting". The respondent started in business in the Ottawa area in 1933 and its sheet metal work is managed by Mr. Hugh Francis who is secretary of the respondent and one of its principals. The other two principals are his two brothers. At the time of the hearing, the respondent employed twelve sheet metal workers, six in its sheet metal shop and six in residential construction. The six shop employees do the respondent's work in the ICI sector and high-rise apartment construction. That is the pattern which prevailed prior to and after Local 47 acquired its bargaining rights for employees of the respondent.

10. There is no issue between the parties about the ICI and high-rise apartment work. The respondent has applied the provisions of the sheet metal workers provincial agreement to that kind of work, and before the first provincial agreement came into effect, it applied the provisions of the MCAO agreements. On the other hand, the respondent did not apply the agreement it first signed with Local 47 to residential construction other than high-rise apartment buildings, nor did it apply any of the subsequent agreements between Local 47 and the MCAO. In other words, the respondent has not applied any of those agreements to the construction of single and double houses, row houses, town houses and apartments of not more than six units. For ease of reference, that work will be referred to hereafter as "low-rise residential construction".

11. There is no evidence before the Board to show that Local 47 has sought to enforce any of the agreements prior to the residential agreement which became effective October 21, 1982 to any of the work which the respondent has done on low-rise residential construction. In fact, it is reasonable to infer from the evidence before the Board that Local 47 did not enforce its first agreement with the respondent or the three subsequent MCAO agreements on that kind of work when it was performed by the respondent's sheet metal workers.

12. Following expiry of the MCAO agreement on April 30, 1978, Local 47 did not negotiate with the MCAO again until 1982. The MCAO bargaining committee was comprised of William Chauvin, its executive director, and three sheet metal contractors who were not active in residential construction. According to Chauvin, the MCAO has seventeen members who are sheet metal contractors and only the respondent and one or two others are substantially involved in residential construction. While Mr. Francis was chairman of the MCAO at the time, he was unwilling to serve on the negotiating committee because he considered the respondent to be a "non-union" employer in residential construction. With so few of its sheet metal contractor members engaged in residential construction, the MCAO was unable to put together a negotiating committee of members with any special knowledge of residential construction, excluding high-rise apartments. During the latter stages of the negotiations, the two bargaining committees arranged to have Mr. Francis attend a meeting. At this meeting the parties discussed various accommodations which were aimed at assisting contractors who would

be bound to the agreement in meeting non-union competition. Some of these accommodations were made part of the final bargain included in the Residential Agreement which was signed on October 21, 1982. These were mostly the suggestions of Francis.

13. At the bargaining session which Francis attended, Local 47 took the position that the respondent would be bound to the collective agreement ultimately negotiated because of the voluntary recognition agreement made in 1972. Francis, on behalf of the respondent took the contrary position and maintained that the respondent had never granted voluntary recognition with respect to the residential construction work covered by the Residential Agreement which the parties were seeking to negotiate and which was ultimately concluded between them. Once the agreement was signed, Local 47 sought to get the respondent to acknowledge that it was bound to the new agreement. Its efforts included visiting and seeking to enroll as members the employees of the respondent who worked on residential construction. Ross Mitchell, the business representative of Local 47 who visited the employees, told the Board that he took this step in order to avoid the need to submit the issue to arbitration, even though it was Local 47's position throughout that the respondent was bound to the Residential Agreement. An employee of the respondent testified, however, that, when Mitchell talked to the "residential" employees, he did not mention Local 47's claim that the respondent was already bound to a collective agreement with Local 47.

14. The MCAO's two applications to be certified as an accredited employer bargaining agency were processed separately by the Board, although there were common hearings into the applications. The Board ultimately issued a single certificate to the MCAO on February 16, 1973. That certificate describes in the following terms the bargaining unit of employers for which the MCAO was made the accredited bargaining agent:

... all employers of Sheet Metal Workers and Sheet Metal Worker apprentices on whose behalf [Local 47] has bargaining rights in the following [geographic] area, ... in the industrial, commercial and institutional sector and residential sector."

The Board's certificate goes on to list the employers for whom the MCAO was to be the bargaining agent under the certificate and, having done so, ends the paragraph with the following statement:

"... and such other employers for whose employees The Sheet Metal Workers' International Association, Local Union 47 may after February 18, 1972 obtain bargaining rights through certification or voluntary recognition in the geographic area and sector set out in the unit of employers described herein."

That provision reflects the Board's mandate set out in section 127(2) of the Act [at the time of the certificate, section 115(2)] which provides as follows:

127.-(2) If the Board is satisfied

(a) that a majority of the employers in clause (1)(a) is represented by the employers' organization; and

- (b) that such majority of employers employed a majority of the employees in clause (1)(c),

the Board, subject to subsection (3), shall accredit the employers' organization as the bargaining agent of the employers in the unit of employers *and for such other employers for whose employees the trade union or council of trade unions may, after the date of the making of the application, obtain bargaining rights through certification or voluntary recognition in the appropriate geographic area and sector.*

[emphasis added]

Paragraph 13 of the Board's decision to issue the certificate of accreditation to the MCAO acknowledges the authority of section 127(2) in the following words:

13. Having regard to all the above findings a Certificate of Accreditation will issue to the applicant for the unit of employers found to be the appropriate unit of employers in paragraph 5 *and in accordance with the provisions of section [127(2)] of the Act for such other employers for whose employees the respondent may after February 18, 1972, obtain bargaining rights through certification or voluntary recognition in the geographic area and sectors set out in the appropriate unit of employers.*

[emphasis added]

15. The respondent's name does not appear on the list of employers set out in the certificate or in paragraph 5 of the decision. It is undisputed between the parties, however, that the respondent extended voluntary recognition to Local 47 for sheet metal workers employed by the respondent within the identical geographic area set out in the certificate and the decision. The dispute between them is with respect to the sector or sectors of the construction industry for which the respondent granted voluntary recognition to Local 47 and the related issue of what effect the subsequent accreditation of the MCAO had on those bargaining rights.

16. The sections of the Act which bear on the issues herein are sections 16(3), 125, 126, 127(2), 128(1) and 128(4). The text of section 127(2) is set out above. The remaining sections, which, at the time of the MCAO's accreditation applications, were respectively sections 15(3), 113, 114, 116(1) and 116(4) provide as follows:

16.-(3) Where an employer and a trade union agree that the employer recognizes the trade union as the exclusive bargaining agent of the employees in a defined bargaining unit and the agreement is in writing signed by the parties, the Minister may, upon the request of either party, appoint a conciliation officer to confer with the parties and endeavour to effect a collective agreement.

125. Where a trade union or council of trade unions has been certified or has been granted voluntary recognition under section 16 as the bargaining agent for a unit of employees of more than one employer in the construction industry or where a trade union or council of trade unions

has entered into collective agreements with more than one employer covering a unit of employees in the construction industry, an employers' organization may apply to the Board to be accredited as the bargaining agent for all employers in a particular sector of the industry and in the geographic area described in the said certificates, voluntary recognition documents or collective agreements, as the case may be.

126.-(1) Upon an application for accreditation, the Board shall determine the unit of employers that is appropriate for collective bargaining in a particular geographic area and sector, but the Board need not confine the unit to one geographic area or sector but may, if it considers it advisable, combine areas or sectors or both or parts thereof.

(2) The unit of employers shall comprise all employers as defined in clause 117(c) in the geographic area and sector determined by the Board to be appropriate.

128.-(1) Upon accreditation, all rights, duties and obligations under this Act of employers for whom the accredited employers' organization is or becomes the bargaining agent apply with necessary modifications to the accredited employers' organization.

• • • • •

(4) Where, after the date of the making of an application for accreditation, the trade union or council of trade unions obtains bargaining rights for the employees of an employer through certification or voluntary recognition, that employer is bound by any collective agreement in existence at the time of the certification or voluntary recognition between the trade union or council of trade unions and the applicant employers' organization or subsequently entered into by the said parties.

17. The means employed by the respondent and Local 47 for entering into a voluntary recognition agreement is one commonly practiced in the construction industry; that is, signing the same collective agreement that the union has made with another employer or other employers. In this case, it was the collective agreement between the MCAO and Local 47 which, by its terms, was effective from May 10, 1971 to April 30, 1973, together with the addendum to that agreement which the parties signed that same day. The MCAO's two applications for accreditation already being before the Board, it would seem from a plain reading of section 128(4) that the documents which the respondent and Local 47 signed were of no legal consequence as a collective agreement since the section stipulates that, where the trade union respondent to an accreditation application acquires bargaining rights for employees of an employer through voluntary recognition after the making of the application, "... the employer is bound by any collective agreement in existence at the time of the ... voluntary recognition between the trade union ... and the applicant employers' organization". The question of whether the two documents are of no legal consequence as a collective agreement does not have to be decided by the Board in this case because they at least constitute a voluntary recognition agreement as referred to in section 16(3) of the Act. That is, they constitute an agreement in which the respondent recognizes Local 47 as the exclusive bargaining agent for its

sheet metal workers in a defined bargaining unit. The defined bargaining unit is the one described in the MCAO collective agreement with Local 47, amended by the addendum with respect to work in the residential sector of the construction industry.

18. The Board has already made the finding of fact that the scope of the respondent's voluntary recognition of Local 47 excluded low-rise residential construction. Thus the respondent recognized Local 47 as the bargaining agent for the respondent's employees employed in the construction industry, excluding those persons employed in low-rise residential construction. By virtue of that recognition and the operation of section 128(4) of the Act, the respondent would have become bound to the MCAO agreement which was then in effect for the remainder of its term (section 128(7)). That was the agreement effective from May 10, 1971 to April 30, 1973.

19. When the MCAO was accredited on February 16, 1973, it became the bargaining agent for the respondent by operation of section 127(2) of the Act and pursuant to the terms of the Board's accreditation certificate. In that respect, see the emphasized wording of the above extract from the certificate. Those bargaining rights were of the same scope as the bargaining rights granted voluntarily by the respondent to Local 47 because the effect of the accreditation provisions of the Act was to consolidate existing bargaining rights, not to extend them. That is made clear in *Thomas Construction (Galt) Limited*, Board File No. 0035-82-M, an unreported decision which issued July 9, 1982. The Board traced the course of bargaining rights acquired by the trade union from when it was certified on August 17, 1973 as bargaining agent for a unit of construction labourers employed by Thomas through to the statutory extension of bargaining rights in the ICI sector of the construction industry from local area recognition to province-wide recognition by the introduction of section 137(2) of the Act. The trade union had been certified for construction labourers employed by Thomas in Brant and Norfolk counties, the Board's geographic area #4. At the same time, an application for accreditation made by what is now the Grand Valley Construction Association was before the Board. A certificate of accreditation was later issued to the Association on March 11, 1974 for a unit comprised of all employers which employed construction labourers for whom the trade union held bargaining rights in the counties of Waterloo, Wellington, Dufferin, Grey, Brant and Norfolk. At paragraph 4 of the *Thomas* decision, the Board quoted an extract from the accreditation decision in which the Board observed that the unit of employers defined in the accreditation certificate includes employers of construction labourers for whom the trade union held current bargaining rights in less than all six counties named above. Then at paragraph 5 of the *Thomas* decision, the Board made the following finding:

5. As a consequence of the accreditation order, the respondent employer was bound by the collective agreement negotiated between the Kitchener-Waterloo Construction Association which later became the Grand Valley Construction Association, and the applicant trade union *for the counties of Brant and Norfolk*.

• • • •

(emphasis added)

It is clear from the balance of the decision that the geographic scope of the trade union's bargaining rights remained restricted to Brant and Norfolk counties, in spite of the fact that

the collective agreements to which Thomas became bound described a unit having a geographic scope of the six counties, until section 137(2) of the Act came into effect. While that part of the *Thomas* decision concerns itself with the geographic scope of the bargaining rights at issue, the same principle applies with respect to the the “sectorial” limits of bargaining rights.

20. Thus, even though the MCAO is an accredited employers’ organization empowered by section 128(1) of the Act to bargain on the respondent’s behalf with Local 47, when the MCAO and Local 47 negotiated the collective agreement which was in effect from May 1, 1973 to April 30, 1975, which, by its terms covers the ICI and residential sectors of the construction industry, the MCAO was not empowered to extend its bargaining rights for the respondent with respect to sector any more than it could with respect to geographic area. Nor had the respondent given the MCAO express authority to do so on the respondent’s behalf. Therefore the respondent was bound by the May 1, 1973 agreement only to the extent of Local 47’s bargaining rights for the respondent’s employees. Consequently, the respondent was not bound to the agreement insofar as it purported to cover low-rise residential construction. There was no intervening event which would have altered that relationship during the next two collective agreements between the MCAO and Local 47.

21. When the scheme of province-wide bargaining in the ICI sector of the construction industry became effective on May 1, 1978, the bargaining rights with respect to that sector affected by the accreditation order were subsumed into provincial bargaining designations. The MCAO’s bargaining rights for the respondent in ICI sector were merged into the bargaining rights of the Ontario Sheet Metal and Air Handling Group. Local 47’s bargaining rights for the respondent’s employees engaged in the ICI sector were merged into those of the Sheet Metal Workers’ International Association and the Ontario Sheet Metal Workers Conference of the Sheet Metal Workers International Association. These organizations were the designated bargaining agencies for, respectively, the employers and employees. The two designated bargaining agencies became parties to a provincial agreement which was in effect from May 1, 1978 to April 30, 1980 and the respondent, by operation of law became bound to the provincial agreement and to its successor provincial agreement which was in effect from May 1, 1980 to April 30, 1982 with respect to the ICI sector within the same geographic area to which the MCAO agreement had applied. When section 137(2) of the Act came into effect on May 1, 1982, it deemed the respondent to have recognized in the ICI sector throughout the Province of Ontario all of the affiliated bargaining agents represented by the designated employee bargaining agency. By virtue of that deemed recognition, the respondent became bound throughout the province by the new provincial agreement which was in effect from May 1, 1982 to April 30, 1984. That is the “ICI agreement” referred to in the note to clause 2.1 of the Residential Agreement. While the employers, including the respondent, who had been bound to the MCAO agreement which expired April 30, 1978 had applied the terms of the ICI agreement to high-rise apartment construction during the period May 1, 1978 to October 20, 1982, there was no collective agreement covering the residential sector (except to the extent that the agreement bearing the expiry date of April 30, 1978, may have been extended by its terms beyond that date).

22. When finally the MCAO and Local 47 executed the Residential Agreement, they were giving effect to the bargaining rights for the residential sector which previously had been incorporated in the agreement bearing the expiry date of April 30, 1978. In the respondent’s

case, the Board has found the scope of these rights to be as described in the voluntary recognition agreement signed between the respondent and Local 47 on September 29, 1972. These were the same as Local 47's bargaining rights contained in the May 10, 1971 to April 30, 1973 collective agreement with the MCAO, subject to the express limitation in the "addendum" part of the voluntary recognition agreement. This was a limitation which Local 47 accepted in order to obtain voluntary recognition from the respondent and the Board has found that limitation to exclude low-rise residential construction from those bargaining rights. Local 47 has accepted that exclusion for the 10 years intervening between the voluntary recognition agreement and the Residential Agreement. In the result, Local 47's bargaining rights with respect to the residential sector on the making of the Residential Agreement were still exclusive of low-rise residential construction. Consequently, the Residential Agreement between the Sheet Metal Workers International Association, Local Union 47 and the Mechanical Contractors Association of Ottawa (Sheet Metal Division) is not binding on the respondent insofar as it applies to "... Sheet Metal Journeymen and Apprentices working on New Residential construction of single and double houses, row houses, town houses and apartments of not more than six (6) units."

23. This case differs significantly on its facts from the Board's decision in *Culliton Brothers Limited*, [1982] OLRB Rep. March 357, a decision relied on by applicant counsel in arguing that the bargaining rights for the respondent's sheet metal workers which Local 47 acquired through voluntary recognition in 1972 had survived, through operation of the accreditation and province-wide bargaining provisions of the Act, until October 21, 1982 when the Residential Agreement was signed. In *Culliton*, Local 47 was certified by the Board in August 1976 with respect to a bargaining unit of Culliton's sheet metal workers. The unit was described so as to include all sectors of the construction industry in a geographic area falling within and being part of the geographic area defined in the MCAO's accreditation certificate. The Board found that, with respect to the residential and ICI sectors in the geographic area described in Local 47's certificate, Culliton had become bound to the collective agreement between Local 47 and the MCAO which was in effect when the certificate had issued to Local 47. The Board found further that Culliton continued to be bound to the same extent by the successor collective agreements between Local 47 and the MCAO until April 30, 1978. When the first sheet metal workers provincial agreement became effective on May 1, 1978, Culliton was bound to that agreement with respect to the ICI sector in the same geographic area described in Local 47's certificate. Culliton did not perform any sheet metal work in that area after approximately January 1977, but it continued to perform sheet metal work in the ICI sector in another Board area in which its place of business was also located. When section 137(2) of the Act referred to above in paragraph 19 deemed existing bargaining rights in the ICI sector to have province-wide effect, Culliton, on the strength of Local 47's bargaining rights, was deemed to have recognized all of the affiliated bargaining agents of the employee bargaining agency in the Province of Ontario. As a result Culliton and all of its sheet metal workers employed in the ICI sector became bound to the provincial agreement.

24. The introduction of section 137(2) had a similar effect on the respondent to the extent that it should employ sheet metal workers in the ICI sector anywhere in the province. That extension of bargaining rights resulted from a specific statutory provision in the form of section 137(2). There is no similar provision with respect to the accreditation sections of the Act. Absent any statutory provisions which would extend to all of the residential sector, Local 47's bargaining rights for the respondent's sheet metal workers engaged in high-rise residential construction, the only way by which the respondent would become bound to the Residential

Agreement with respect to the rest of the residential sector would be for Local 47 to obtain bargaining rights either by certification or voluntary recognition. To put it another way, were the Board on the facts herein to find the respondent to be bound by the Residential Agreement for low-rise construction, it would be enlarging rather than preserving the bargaining rights actually held by Local 47 when the Board's certificate of accreditation issued to the MCAO. That result is neither the purpose nor the intent of the accreditation provisions of the Act.

25. In the result of the Board's findings in paragraph 21, and since the grievance does not allege any violation of the Residential Agreement with respect to high-rise apartment construction, the Board has no jurisdiction under section 124 of the Act to deal with the grievance on its merits and, accordingly, the grievance is dismissed. It is unnecessary, therefore, for the Board to deal with the issues raised by respondent counsel with respect to estoppel, abandonment and the application of the Charter of Rights to the circumstances of this application.

2154-83-OH Murray Strong, Complainant, v. General Motors of Canada Limited and Ron Broad, Respondents

Health and Safety – Practice and Procedure – Witness – Complainant serving summons on health and safety inspector who conducted tests – Inspector not compellable witness

BEFORE: R. D. Howe, Vice-Chairman, and Board Members J. Wilson and H. Kobryn.

APPEARANCES: *Howard S. Swartz for the complainant; E. T. McDermott for the respondents; Pauline Dietrich for Fred Iacovoni.*

DECISION OF THE BOARD; March 13, 1984

1. This is a complaint under section 24 of the *Occupational Health and Safety Act* (the "Act") in which the complainant alleges that he has been dealt with by the respondents contrary to section 24(1) of the Act.

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3. Counsel for the respondents requested the Board to issue a decision recording its oral ruling with respect to the compellability of Fred Iacovoni, and recording an undertaking given to the Board by the complainant with respect to another complaint which he has filed with the Board. Counsel for the complainant agreed that the issuance of such a decision would be appropriate in the circumstances of this case.

4. At the commencement of the hearing of this matter on March 5, 1984, counsel made submissions to the Board concerning the compellability of Fred Iacovoni, who had been served with a summons at the instance of the complainant. After hearing and recessing to consider those submissions, the Board made the following unanimous oral ruling, which is hereby confirmed:

Mr. Swartz, as counsel for the complainant, seeks to compel Fred Iacovoni to testify in respect of this complaint under section 24 of the *Occupational Health and Safety Act*. Mr. Iacovoni is an “inspector” appointed for the purposes of the Act, within the meaning of part 14 of section 1 of the Act. Ms. Dietrich, as counsel for Mr. Iacovoni, submits that Mr. Iacovoni cannot be compelled to testify in respect of this complaint by virtue of section 34(2) of the Act, which provides:

An inspector or a person who, at the request of an inspector, accompanies an inspector, or a person who makes an examination, test, inquiry or takes samples at the request of an inspector is not a compellable witness in a civil suit or any proceeding, except an inquest under the *Coroners Act*, respecting any information, material, statement or test acquired, furnished, obtained, made or received under this Act or the regulations.

In support of her position, Ms. Dietrich submits that this hearing is a “proceeding” within the meaning of section 34(2). Counsel for the complainant does not dispute that this is a proceeding, but suggests that the evidence which he seeks to adduce through Mr. Iacovoni is not “respecting any information, material, statement or test acquired, furnished, obtained, made or received under this Act or the regulations”. The complaint seeks to compel Mr. Iacovoni to testify concerning the time at which he issued his report and concerning certain statements allegedly made by supervisory personnel to Mr. Iacovoni after he had completed his tests, which statements will allegedly disclose their bias against the complainant, and the true motivation for his discharge. Counsel for the respondent supports Ms. Dietrich’s position, and suggests that any attempt to limit his cross-examination of Mr. Iacovoni in the manner implicit Mr. Swartz’s submission might constitute a denial of natural justice.

Having considered the submissions of the parties, it is our ruling that Mr. Iacovoni is not a compellable witness in respect of any of the matters identified by Mr. Swartz in his able submissions. We agree with Ms. Dietrich’s submission that the hearing of this complaint is a “proceeding” within the meaning of section 34(2) of the Act. The broad scope of the phrase “civil suit or any proceeding” is apparent not only from the use of the word “any”, but also from the express exclusion of an inquest under the *Coroners Act*. If the words “any proceeding” did not include administrative hearings, then that exclusion would be unnecessary. (See, generally, *Re Dorothea Knitting Mills Ltd.* (1975), 9 O.R. (2d) 378, and *Re Harry Woods Transport Ltd.* (1980), 25 L.A.C. (2d) 60.) Moreover, we are satisfied that the evidence which the complainant seeks to compel Mr. Iacovoni to give is evidence respecting information, material, statements or tests acquired, furnished, obtained, made or received under the Act or regulations. The alleged statements by supervisory personnel clearly fall within the ambit of statements received under the Act. The

issuance of the report was one of the official functions which Mr. Iacovoni was performing on the premises and was itself information furnished by Mr. Iacovoni under the Act. Finally, we would note that there are sound policy reasons for upholding Ms. Dietrich's objection. If an inspector is to be able to properly perform his important functions under the Act, he must be able to freely obtain information from persons in the workplace and carry out his other tasks in a context in which neither he nor the persons with whom he speaks will feel constrained by the possibility that he may subsequently be compelled to testify at the instance of one of the parties to proceedings such as a complaint under section 24 of the Act. Thus, we are satisfied that the objects of the Act are best served by the aforementioned construction of section 34(2), which we feel to be of the type permitted and encouraged by section 10 of the *Interpretation Act*, R.S.O. 1980, c. 219, which provides:

Every Act shall be deemed to be remedial, whether its immediate purport is to direct the doing of any thing that the Legislature deems to be for the public good or to prevent or punish the doing of any thing that it deems to be contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.

Accordingly, we rule that Mr. Iacovoni cannot be compelled to testify in respect of any of the aforementioned matters, and he is hereby released from the summons served upon him by the complainant.

5. On February 23, 1984 the complainant filed with the Board a complaint under section 89 of the *Labour Relations Act* in which he alleges that he has been dealt with by the United Automobile Workers contrary to the provisions of section 68 of the *Labour Relations Act* (Board File No. 2737-83-U). Although General Motors of Canada Limited is not named as a respondent in that complaint, Mr. McDermott expressed concern that the complainant might seek to amend that complaint so as to add the company as a respondent, and to seek reinstatement through that complaint. It was Mr. McDermott's position that such amendments could place the company in "double jeopardy". Accordingly, he indicated that he wished to raise with the Board the matter of the desirability of consolidating the two complaints, unless the complainant was prepared to give an undertaking which would eliminate that concern. The complainant then gave the Board his personal undertaking that he would not seek to amend that section 68 complaint so as to add the company as a party, to request reinstatement, or to request compensation from the company. Since that undertaking was satisfactory to the company, the question of consolidation was not further pursued.

6. This matter is referred to the Registrar to be listed for continuation of hearing on June 11, 28, July 3, 4, and 5, 1984.

1738-83-R Ontario Sheet Metal Workers Conference Sheet Metal Workers International Association, Local 269, Applicants, v. **Gerald Davidson Plumbing & Heating Limited** 419227 Ontario Limited, Respondents, v. Group of Employees, Objectors

Related Employer – Non-union business setting up numbered company to do union work and signing recognition agreement – Statutory conditions for declaration that two employers related met – No loss of jobs for union – No interchange of labour force – Union not representing any affected employee at time of recognition – Declaration having effect of thrusting union and extending bargaining rights – Discretion not exercised to make declaration

BEFORE: R. O. McDowell, Vice-Chairman, and Board Members F. W. Murray and H. Kobryn.

APPEARANCES: *S. B. D. Wahl, L. Lavallee and G. Ward for the applicants; Peter J. Thorup, Ben Ring, Gerry Davidson and J. C. McClland for the respondents; Philip S. Staddon for the objectors.*

DECISION OF THE BOARD; March 20, 1984

1. This is an application under section 1(4) of the *Labour Relations Act*. The applicant union seeks a declaration that the respondent, Gerald Davidson Plumbing & Heating Limited and 419227 Ontario Limited ("the numbered company") are one employer for the purposes of the Act. Section 1(4) reads as follows:

Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

The respondents concede that the prerequisites for a section 1(4) declaration have been met; however, they contend that the Board should exercise its discretion not to make such declaration.

2. The respondent Gerald Davidson Plumbing & Heating Limited was incorporated in April, 1970 to carry on an oil burner service business. It is owned by Gerald Davidson and his wife Jean, who between them control ninety-nine per cent of the shares. Initially, the business operated out of the Davidson home and employed only Gerald Davidson, his wife, his brother Bill, and one other employee. However, the business prospered, and as the scope of its activities expanded, it required more space and more employees. In 1976, the company moved out of the Davidson home to 20 Young Street in Brighton. In 1979, the company built a building in Brighton which it owns and from which it has since carried on business.

3. As the company's plumbing and heating business grew, it began to hire more employees and play a more prominent role in the local market. It now has twelve service trucks and twenty-two employees, of whom seventeen (mostly plumbers and sheet metal workers) work in the field. About seventy-five per cent of its work is in the industrial, commercial and institutional sector (ICI) of the construction industry in the Trenton-Belleville-Kingston area. None of its employees is a member of the applicant union, nor has there ever been any attempt by the applicant union to organize them or seek certification as their bargaining agent. At the opening of the hearing, a solicitor for these employees presented a petition on their behalf indicating that they do not want the union to represent them.

4. In 1979, the company put in a bid for a job at a local Quaker Oats plant but was told that bids could only be accepted from unionized subcontractors. Gerald Davidson concluded that the problem could be resolved by setting up a separate company to undertake those projects which had to be done pursuant to a collective agreement. The numbered company was incorporated for this purpose on June 27, 1979. In July of 1979, the numbered company entered into a voluntary recognition agreement with Local 320 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada ("UA") which had the effect of binding it to the UA's province-wide ICI agreement. The agreement was applied and union members hired at the Quaker Oats job. It is interesting to note, however, that the voluntary recognition agreement with the numbered company includes an express acknowledgement that the UA is aware of the existence of Gerald Davidson Plumbing & Heating Limited and that the recognition agreement does *not* bind that company, but only the numbered company. In effect, the agreement is a waiver of any rights under section 1(4) of the Act and permits Gerald Davidson to run a related and non-union business.

5. The Quaker Oats project did not have sufficient sheet metal work to require Davidson to approach the Sheet Metal Workers' union, but the following summer, Gerald Davidson Plumbing & Heating Limited was the successful bidder on a job for Lake Ontario Cement in Picton, Ontario. This project too had to be done exclusively by unionized contractors and there was sufficient sheet metal work involved to require a relationship with the applicant union. Once again, Gerald Davidson sought to establish such relationship through the numbered company so as to preserve the non-union status of his main business. Davidson asked the Local UA business agent to act as go-between and to make arrangements for a meeting with the appropriate officials from the Sheet Metal Workers' union. The meeting was held on August 11, 1980 at a local motel. It was attended by Mr. Davidson, Ben DeBruyn, his site supervisor, and Leo Lavallee, a representative of the applicant union.

6. What took place at the meeting is a matter of some dispute. The witnesses gave contradictory versions of what was, or was not, said. The result of the meeting was a voluntary recognition agreement between the applicant and the numbered company, however, the witnesses had quite different views as to the intention and scope of that agreement. The union maintains that it was intended to cover all sheet metal work done by Gerald Davidson's business, including the work on "non-union" projects which has traditionally been done by a stable crew of established employees working for Gerald Davidson Plumbing & Heating Limited. Mr. Davidson maintains that the agreement was intended to apply only to the numbered company and to union projects. In both cases, of course, the witnesses were being called upon to reconstruct a conversation which occurred almost three and a half years ago and this, in itself, may explain some of the contradictions in the evidence. One cannot expect an untrained witness to recall with precision events which occurred some years ago and which no one at

the time anticipated would be subjected to the scrutiny of a legal proceeding. With the passage of time there is bound to be some distortion attributable to faulty recollection, moreover, human memory tends to be selective, and there is an inevitable tendency to reshape one's recollection of events into the pattern most advantageous to one's own particular position.

7. Gerald Davidson testified that his purpose in signing the voluntary recognition agreement was to set up a relationship similar to the one which he had with the UA. He was sure that in his conversation with Leo Lavallee, he had distinguished between Gerald Davidson Plumbing & Heating Limited and the numbered company which, at the time, he expected to carry on business under the name of "Gerald Davidson Mechanical Contractors". Mr. Davidson was sure that he had made it clear to Lavallee that there were two separate companies, only one of which would be unionized. He assumed that Lavallee knew about his main business because his company had been established and active in the local market for some years.

8. Mr. Davidson's testimony is supported by that of Ben DeBruyn, who was present during the meeting and witnessed the execution of the voluntary recognition agreement. DeBruyn was also sure that Davidson had distinguished between his main business, the numbered company and Gerald Davidson Mechanical Contractors. He testified that Davidson explained his intention to keep the two companies separate and did not undertake that all sheet metal work would be done by union members. DeBruyn thought that Lavallee had been told that there were two corporate entities, one of which was Gerald Davidson Plumbing & Heating Limited. DeBruyn was relieved at the time that the whole business would not be unionized because he does not have a sheet metal worker's certificate of qualification which, he thought, was required by all union members. If Davidson's business were totally unionized, DeBruyn might be out of a job. Lavallee told him that he could work as a supervisor on the Lake Ontario Cement project so long as he did not work "at the tools". DeBruyn also confirmed Davidson's recollection that, towards the end of the meeting, Lavallee said words to the effect that "some day you might find it profitable to use all licensed sheet metal workers' union help". Davidson recalls the comment as "maybe some day you will want your other shop with an agreement too".

9. Leo Lavallee denies both statements attributed to him. He maintains that he had no prior knowledge of Davidson's business operations, and Davidson never mentioned that there were two separate companies, one of which was to be union and the other non-union. Lavallee thought there was only one enterprise with the name "Gerald Davidson" and that this was the entity with which he was signing an agreement. He testified that he did not suspect that there was a pre-existing business with an established crew of sheet metal workers who would remain non-union and outside the scope of the agreement. Lavallee told the Board that he did not discover the activities of Gerald Davidson Plumbing & Heating Limited until the spring of 1983, when, by accident, he was inspecting a work site and discovered a Davidson employee who was not a union member. That discovery triggered a series of enquiries culminating in the present application.

10. Following the execution of the voluntary recognition agreement, Davidson and DeBruyn returned to the company's premises where, in discussion with Mrs. Davidson, they learned that a few days before, the company's solicitors had advised that the name "Gerald Davidson Mechanical Contractors" could not be used. Accordingly, Davidson notified the union of the problem and a new agreement was prepared solely in the name of the numbered

company. Pursuant to that agreement (which as in the case of the UA “plugged in” to a province-wide Sheet Metal Workers’ ICI agreement) four members were dispatched from the hiring hall and worked intermittently for the numbered company between August 18th and September 10th. The following summer two employees from the union hiring hall were employed between June 30 and July 2, 1981 on a project at Albert College in Belleville. That was the extent of the activities of the numbered company which called for the employment of members of the applicant union. After July of 1981, the numbered company did not bid or receive any new jobs, nor did it have occasion to hire any members of the applicant union. For about two and a half years the numbered company has been inactive, because Gerald Davidson has decided that he does not wish to bid on any more union jobs. Mr. Davidson testified that he had intended to dissolve the company but this proceeding intervened before he got around to doing so. It is apparent, therefore, that the “unionized aspect” of Mr. Davidson’s business was a minor and short-lived phenomenon, and unless this Board issues a section 1(4) declaration, the bargaining rights gratuitously created by the voluntary recognition agreement of August 11, 1980 may soon be extinguished.

11. The union claims that Mr. Davidson intentionally misled Mr. Lavallee into believing that the voluntary recognition agreement applied to his entire business and, in particular, to the employees then and later working for Gerald Davidson Plumbing & Heating Limited. Lavallee’s evidence was that the latter company had never been mentioned in discussions, and the union argues that Mr. Davidson intentionally misled Mr. Lavallee or allowed him to believe that the entity “Gerald Davidson Mechanical Contractors” was the same thing. Alternatively, the union argues that, in the circumstances, the Board should find that Mr. Davidson really was purporting to bind Gerald Davidson Plumbing & Heating Limited since there was no such thing as “Gerald Davidson Mechanical Contractors” and the numbered company was not added to the agreement until later. The respondent companies argue that there was never any intention to bind both companies to the agreement and any misapprehension on Mr. Lavallee’s part stems from faulty recollection or a misunderstanding of what was said to him. Counsel submits that, at most, there was an innocent misrepresentation or a failure of communication. Counsel also points out that, at the time the voluntary recognition was signed, there were about fifteen employees of Gerald Davidson Plumbing & Heating Limited, none of whom were trade union members. At the time the voluntary recognition agreement was entered into, the union didn’t represent anyone. In the respondents’ submission, to sweep employees into a collective bargaining relationship against their will would be a totally unwarranted extension of the union’s bargaining rights, particularly since some of the employees in question were working for Gerald Davidson well before August 11, 1980.

12. Section 1(4) of the Act is designed to deal with situations where the economic activities giving rise to the employment relationships regulated by the Act are carried on by or through more than one legal entity. Where such legal entities are engaged in related economic activities under common control and direction, the Board is entitled to “pierce the corporate veil” and treat them as one employer for the purposes of the Act. The Legislature has determined that legal form should not dictate (and possibly fragment) the collective bargaining structure; nor should corporate restructuring be permitted to undermine established bargaining rights. Those statutory rights are not treated as co-extensive with the legal framework of the business, and, to this extent, section 1(4) insulates collective bargaining from disruption when an employer changes the number or form of the legal vehicles through which it carries on business. (See generally *Industrial Mines Installations Limited*, [1972] OLRB Rep. Dec. 1029.) But a section 1(4) declaration is discretionary. It is not intended to be an automatic response

in every situation where its statutory preconditions are met. In determining whether that discretion should be exercised, the Board must have regard to both the mischief to which the section was directed, and the particular context under review.

13. In the present case there is no doubt that the statutory preconditions for section 1(4) are met. The numbered company really has no separate or independent existence. It is little more than a bank account and a payroll mechanism for dealing with the few unionized workers that the company has been called upon to hire from time to time. For example, the Lake Ontario Cement job was bid by Gerald Davidson Plumbing & Heating Limited and there was no assignment of that contract to the numbered company even though it was the numbered company which later hired the sheet metal workers doing the work. The money from the general contractor was paid directly to Gerald Davidson Plumbing & Heating Limited which then transferred sufficient funds to the numbered company's account to meet the payroll. A similar arrangement was applied on the earlier project at Quaker Oats where the numbered company employed members of the UA. On the Albert College project *both* companies bid (i.e., nominally against each other). Despite the two separate legal vehicles, there is really only one business which Mr. Davidson has artificially divided into a union and non-union aspect. This is precisely the kind of situation where, ordinarily, a section 1(4) declaration would be warranted.

14. However, there are countervailing considerations. This is not a case in which a unionized firm has spawned a non-union offspring designed to siphon away work from the unionized enterprise to the detriment of the union members working there. There is no interchange of employees between the two firms. There is no common labour force or pool of employees drawn by the two companies in the manner mentioned by the Board in *Industrial Mines Installations Limited, supra*. In the five years of its existence, the numbered company has done very little work and there is little indication that work opportunities destined for the numbered company have been redirected to Gerald Davidson Plumbing & Heating Limited. The latter company has not been used surreptitiously on unionized job sites to the detriment of the numbered company and its potential employees, nor has there been any real departure from its established practice of bidding on non-union jobs. It was and continues to be a non-union contractor with its own field crews, as it has been since 1970.

15. More important, however, is the fact that at the time of the purported voluntary recognition agreement, the union did not represent *any* of the employees potentially bound by it – some of whom had been employed by Gerald Davidson Plumbing & Heating Limited for some years. Those employees had no appetite for collective bargaining then and do not want the union now. We see no reason why collective bargaining should be thrust upon them, or why the union's bargaining rights should be thus extended. Indeed, if the agreement had purported to apply to Gerald Davidson Plumbing & Heating Limited and had been challenged, we would be inclined to say that it was void, since the union had no right to represent any of the employees affected at the time the agreement was executed. It was not a "pre-hire" agreement of the kind considered by the Board in *Nichols Radtke*, [1982] OLRB Rep. July 1028. Even assuming (without finding) that on August 11, 1980 there was a misrepresentation leading to the execution of the voluntary recognition agreement, we still do not think the circumstances of this case warrant a declaration under section 1(4) of the Act. We would not condone such misrepresentation and it might well justify a union withdrawal from that arrangement. But the remedy in the circumstances of this case is not a section 1(4) declaration.

16. For the foregoing reasons, the application is dismissed.
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1663-83-U Vukota Vujicic, Complainant, v. The Schneider Employees Association, and J. M. Schneider Inc., Respondents

Duty of Fair Representation – Unfair Labour Practice – Senior employee discharged for innocent absenteeism – Union failing to put mind to whether discharge just – Failure to file grievance in absence of express request and treating time limitation as absolute barrier arbitrary in circumstances – Board directing filing and processing of grievance to arbitration and posting of notice to employees

BEFORE: R. D. Howe, Vice-Chairman, and Board Members W. H. Wightman and B. L. Armstrong.

APPEARANCES: *J. Vincent Toolsie and Vukota Vujicic for the complainant; Sheila Block, Rod MacKenzie and John Christensen for the respondent Association; Harvey A. Beresford and Harold Blake for the respondent Company.*

DECISION OF R.D. HOWE, VICE-CHAIRMAN, AND BOARD MEMBER B. L. ARMSTRONG; March 14, 1984

1. This is a complaint under section 89 of the *Labour Relations Act* in which the complainant alleges that he has been dealt with by the Schneider Employees Association (referred to in this decision as the “Association”) contrary to section 68 of the Act. (The complaint also alleges a contravention of section 72(1) of the Act, but that provision was not relied upon at the hearing of this matter, and the evidence adduced in respect of this matter would not in any event support a finding that it had been breached).

2. At the commencement of the hearing of this matter on February 13, 1984, the Board amended the style of cause to add J. M. Schneider Inc. (referred to in this decision as the “Company”) as a respondent, for remedial purposes. That amendment was not opposed by Company counsel.

3. The gist of Mr. Vujicic’s complaint is that the Association acted arbitrarily in failing to represent him with respect to his request that the Company provide him with a “light job” or, alternatively, return him to his regular job, and in failing to grieve the Company’s termination of his employment.

4. Section 68 of the Act provides:

A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of

the trade union or of any constituent union of the council of trade unions, as the case may be.

In *I.T.E. Industries Limited*, [1980] OLRB Rep. July 1001, the Board described the scope and effect of section 68 (then section 60) as follows:

17.*The Labour Relations Act* constitutes the trade union as the employees' exclusive bargaining agent. Within the framework of collective bargaining an employee must depend upon the union to represent him, and cannot bargain individually to establish his terms and conditions of employment. However, the trade union's right to represent employees is not unfettered, and its exclusive bargaining agency carries with it a commensurate responsibility; the union must represent each employee in the bargaining unit, in a manner that is neither "arbitrary, discriminatory, or in bad faith." By enacting section 60 the Legislature has sought to temper the union's authority and prevent abuses which might arise if that authority was entirely unreviewable.

18. Bad faith, malice, discrimination, or subjective ill will are clearly proscribed and readily ascertainable; the real difficulty is to determine when a union's conduct may be properly regarded as "arbitrary" – bearing in mind that the union's affairs may be conducted by laymen with limited formal education, or elected officials who may have been chosen for qualities other than their legal training or understanding of parliamentary procedure. While the Legislature undoubtedly sought to protect the employee from an abuse of the union's authority, I do not think it was intended that every miscalculation, honest mistake, or error in judgment would constitute a breach of a public statute. The standard to which a union must adhere was described in *Ford Motor Company Limited*, [1973] OLRB Rep. Oct. 519 as follows (at paragraph 40):

"40. In deciding whether a union has violated the Act the standards to be applied are important. We recognize that union affairs are conducted for the most part by laymen. In some situations there are experienced full time officials of a trade union who conduct the union affairs; in other situations, the union affairs are conducted by employees in their spare time, while in yet other situations employees may be given a limited amount of paid time by their employers to engage in trade union matters. This Board does not decide cases on the basis of whether a mistake may have been made or whether there was negligence, nor is the standard based on what this Board might have done in a particular situation after having the leisure and time to reflect upon the merits. Rather, the standard must consider the persons who are performing the collective bargaining functions, the norms of the industrial community and the measures and solutions that have gained acceptance within that community; see *Fisher v. Pemberton et al.* 8 D.L.R. (3d) 521 at p. 546."

Similar views were expressed in *Re: Ontario Hydro Employees' Union – CUPE Local 1000 and Walter Prinesdomu*, [1975] OLRB Rep. May 444, at p. 462 ff. in a long passage which canvassed the intended meaning of the word “arbitrary”:

“In using the word arbitrary both the United States Supreme Court and the Legislature of this Province must have envisaged the duty constituting more than the simple castigation of subjective ill-will in that any other interpretation would render the use of this word superfluous. Thus, a well known rule of both statutory and contractual construction militates against the respondent’s particular submissions in this regard. But where does this path lead? Some insight is gained from the *Vaca* case wherein Mr. Justice White juxtaposed the word arbitrary with the word “perfunctory” and observed that a trade union, “in a non arbitrary manner [must] make decisions as to the merits of particular grievances”. It could be said that this description of the duty requires the exclusive bargaining agent to put “its mind” to the merits of a grievance and attempt to engage in a process of rational decision-making that cannot be branded as implausible or capricious.

26. This approach gives the word arbitrary some independent meaning beyond subjective ill-will, but, at the same time, it lacks any precise parameters and thus is extremely difficult to apply. Moreover, attempts at a more precise adumbration have to reconcile the apparent consensus that it is necessary to distinguish arbitrariness (whatever it means) from mere errors in judgment, mistakes, negligence and unbecoming laxness.

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On the other hand we do not believe, at least at this time, that all mistakes and careless conduct by trade union officials fall outside the scope of section 60. It may be difficult to elaborate the precise meaning of arbitrary representation in advance but, as noted above, the very use of the word suggests that some regulation of the quality of decision-making was intended. Accordingly at least flagrant errors in processing grievances – errors consistent with a “not caring” attitude must be inconsistent with the duty of fair representation. An approach to a grievance may be wrong or a provision inadvertently overlooked and section 60 has no application. The duty is not designed to remedy these kinds of errors. But when the importance of the grievance is taken into account and the experience and identity of the decision-maker ascertained the Board may decide that a course of conduct is so implausible, so summary or so reckless to be unworthy of protection. Such circumstances cannot and should not be distinguished from a blind refusal to consider the complaint. However, each case must be decided on its own peculiar facts and it is

clear that the duty is not going to be a fertile field for the individual adversely affected by less flagrant conduct.”

19. It is clear that in order to establish a breach of section 60, a complainant must do more than demonstrate an honest mistake or even negligence. The union must have committed a “flagrant error” consistent with a “non caring attitude”, or have acted in a manner that is “implausible” or “so reckless as to be unworthy of protection”. In other words, the trade union’s conduct must be so unreasonable, capricious, or grossly negligent, that the Board can conclude that the union simply did not give sufficient consideration to the individual employee’s concerns. Honest mistakes or innocent misunderstandings are clearly beyond these parameters and do not attract liability.

See also *Savage Shoes Ltd.*, [1983] OLRB Rep. Dec. 2067 in which the Board wrote:

36. Section 68 requires that each trade union decision be grounded on a consideration of relevant matters, free from the influence of irrelevant considerations. The requirement that a trade union not act in a manner which is in bad faith protects the legitimate expectation that an individual employee’s bargaining agent will act honestly and free of any personal animosity toward him. The requirement that a trade union not act in a discriminatory manner protects against the making of distinctions between employees and groups of employees on bases which have no relevance to legitimate collective bargaining concerns. “Bad faith” and “discriminatory”, therefore, test for the presence, in the process or results of union decision-making, of factors which should not be present. “Arbitrary”, on the other hand, describes the absence in decision-making of those things which should be present. A decision will be arbitrary if it is not the result of a process of reasoning applied to relevant considerations. The duty not to act arbitrarily requires a trade union to turn its mind to the matter at hand.

37. Although this duty is imposed on the trade union as an institution, the trade union observes or breaches the duty through the actions of its officials or decision-making bodies. Especially where an impugned decision is that of single official, there are obvious difficulties in reviewing the process by which that decision was made. Only the union official knows what his thought processes were and what facts and circumstances he actually took into account in the course of arriving at his decision. His ability to recall and articulate what took place in his mind may be influenced, sub-consciously or otherwise, by self-interest and by the knowledge that he is the only witness to these crucial mental events.

38. With these thinking process hidden from direct examination, a review of the behaviour of a trade union official must necessarily focus on what he did and the context in which he did it, as well as on what he says he thought. The result of the decision-making process is weighed against the facts and circumstances on which it is said to have operated. If the

resulting interpretation of facts or of a collective agreement is found by the Board to be “reasonable” (*Clifford Renaud*, [1976] OLRB Rep. Jan. 967, ¶22; *Jay Sussman*, [1976] OLRB Rep. July 349 ¶11; *I.T.E. Industries Limited* [1980] OLRB Rep. July 1001, ¶20), “not unreasonable” (*Ivan Pletikos*, [1977] OLRB Rep. November 776, ¶13), “not open to challenge” (*Oil, Chemical & Automatic Workers International Union and its Local 9-698*, [1972] OLRB May 521, ¶3), or at least “not implausible” (*Canadian Union of Public Employees Local 1000 – Ontario Hydro Employees Union*, [1975] May 444, ¶32), then the Board is inclined to find that the decision is not arbitrary. Where the decision maker, on the other hand, misapprehends facts and circumstances which the Board considers “patent” and arrives at an “almost perverse” understanding of the facts and circumstances, the Board will conclude that union effectively barred itself from “directing its mind to the real question”, and that in so doing it has acted in an arbitrary fashion: *The Corporation of the County of Hastings*, [1976] OLRB Rep. November 1072, ¶22. Where it is difficult to see a rational pathway between the facts and circumstances said to have been taken into account and the interests said to have been balanced on the one hand, and the result on the other, then there arises a rebuttable presumption that the decision was arbitrary.

39. The required thought process may involve more than the simple application of logic to the information then at hand. Decision making may be arbitrary if, before making its decision, the union fails to identify and seek out sources of further relevant information which should be taken into account in making that decision: *Canadian Union of Public Employees Local 2327*, [1981] OLRB Rep. June 523, ¶30; *Swing Stage Ltd.*, re *Alvin Plummer*, [1983] OLRB Rep. Nov. 1920.

(See also *Catharine Syme*, [1983] OLRB Rep. May 775; *George Lazenkas*, [1983] OLRB Rep. Jan. 83; *General Motors of Canada Limited*, [1982] OLRB Rep. Feb. 181; *Bedard Girard Ontario*, [1981] OLRB Rep. Oct. 1338; and *Amalgamated Transit Union*, [1973] OLRB Rep. March 125.)

5. During the hearing of this matter, the Board heard the evidence of the complainant, Vukota Vujicic; Harold Blake, the Manager of Employment in the Company’s Human Resources Department (who was called by the Association as its first witness); John Christensen, the President of the Association; and Mike Karpow, the complainant’s Association steward. There were a number of material conflicts in the testimony of those witnesses. In resolving those conflicts and making the findings of fact contained in this decision, we have considered a number of factors, including the firmness of the witnesses’ respective memories, their ability to resist the influence of self-interest to modify their recollections, the consistency of their evidence, their capacity to express their recollections clearly, and their demeanour while testifying. We have also assessed what is most probable in the circumstances of this case, and what inferences may reasonably be drawn from the totality of the evidence.

6. The complainant commenced employment with the Company on June 3, 1974 in its “hog kill” department. As a result of various accidents, injuries, and illnesses, the complainant has had a rather poor attendance record. In 1978 the complainant’s absenteeism rate

of 23.6% (for the Company's fiscal year) was more than twice the plant average. Accordingly, he was called in for a "counselling session" by Mr. Blake. In 1979 the complainant's absenteeism rate improved marginally by falling to 20.3%, but in 1980 it rose to 27%. In 1981 the complainant's absenteeism rate increased to 66%. In October of 1981 the complainant was called to the Personnel Office where, in the presence of his Association steward, his absenteeism record was reviewed and he was told that further failure to attend work on a regular basis could result in the termination of his employment.

7. The complainant has also been involved in several instances of employment related misconduct for which he has been disciplined by the Company. In November of 1975 he was suspended for striking a co-worker. Tom Eason, who was the President of the Association at that time, represented him with respect to that incident. When he was discharged in December of 1976 for another fighting incident, representation by Association officials (including steward Mike Karpow) resulted in the complainant's discharge being reduced to a five day suspension at the fourth stage of the grievance procedure. Mr. Karpow and other Association officials also represented the complainant in respect of a horseplay incident in 1977 (for which he received a warning), and a refusal to perform certain work in June of 1980. The complainant did not suggest that there was anything inadequate or improper about the representation which he received from the Association in relation to any of those matters.

8. In an effort to combat losses of productivity through absenteeism, the Company has formulated and implemented absence control policies. It has also created, with the cooperation of the Association, an absenteeism control committee. That committee is chaired by Mr. Blake and consists of the Company's Health and Safety Supervisor, the Company's Manager of Compensation benefits, and two members of the Association's Executive (generally the President and the Vice-President). The committee attempts to reduce the incidence of absenteeism by arranging programs to assist workers whose absenteeism is caused in whole or in part by alcoholism, drug addiction, marital problems, or other personal difficulties. Moreover, from time to time the Association and the Company agree that particular "light duty" jobs will not be covered by the seniority and job posting provisions of the collective agreement, in order to facilitate the return to work of employees who have been absent due to injury, illness, or other personal difficulties. Although the employees assigned to such jobs do not "own" them (since they are outside the seniority provisions of the collective agreement), once an employee is assigned to such a job he will generally not be removed from it until his physical condition permits him to return to a seniority stream job.

9. From October of 1982 until August of 1983, the complainant was unable to work due to back pain resulting from an injury sustained in a fall on Company premises. In June of 1983, the Company decided to create a new light duty job in the hog kill department and, at the request of the Association, agreed to offer it to the complainant. That job involved recording certain information on a clipboard by ticking one of four columns. Since one of the complainant's physical limitations was that he could not remain standing in one spot for very long, the Company was prepared to provide the complainant with a chair to permit him to perform the job in a sitting position. On June 14, 1983 Mr. Blake telephoned the complainant and offered him that light duty job. The complainant told Mr. Blake that he would check with his doctor and call him back. On the following day the complainant telephoned Mr. Blake and advised him that his doctor had told him that he could not do the job. The complainant also advised the Company's first aid department at or about that time that he had been referred to a specialist by his physician.

10. The complainant was subsequently examined by a specialist who arranged for him to enter the Workers' Compensation Board Hospital and Rehabilitation Centre in Toronto on July 18, 1983 for a period of assessment and treatment. He was discharged from the Centre on August 8, 1983. On or about August 9, 1983, Mr. Vucinic telephoned Mr. Blake to advise him that he had been released from the hospital and was ready to return to work. Mr. Blake told him to wait until the Company had received documentation from the Workers' Compensation Board. On August 10, 1983, the complainant's W.C.B. Rehabilitation Counsellor wrote to the Company as follows:

Please be advised that Mr. Vujicic was admitted to our Hospital and Rehabilitation Centre on July 18, 1983 for a period of assessment and treatment.

Mr. Vujicic was discharged on August 8, 1983, at which time medical information indicated that he is fit for a full-time job allowing frequent position changes, with limited low level work, limited bending and no lifting over 10 kgs.

11. Upon receiving that letter, Mr. Blake arranged to meet with the complainant on August 12, 1983 in the presence of Association President John Christensen and steward Mike Karpow. At that meeting which lasted about ten or fifteen minutes, after reviewing the Company's light duty jobs the Association's representatives expressed agreement with Mr. Blake's conclusion that there were no jobs available that were within the complainant's physical capabilities. Although there were some bargaining unit jobs which the complainant was capable of performing, those jobs were "owned" by the persons who were then performing them, there being no right under the collective agreement to bump a less senior employee out of his job, except in case of layoff. When it became apparent to the complainant at that meeting that the Company was not going to provide him with light duty work, he requested that he be returned to his regular job. Although there was some confusion in the complainant's mind as to what had been his regular job in and before October of 1982, it is relatively clear from the evidence as a whole that on or about December 3, 1979, the complainant was transferred from job #359 (which consists of cleaning the feet of slaughtered hogs) to job #361 (which involves using a knife to trim the fat off the tenderloin at chest level and to trim bruises from the hog top to the centre of the carcass). That transfer occurred as a result of a more senior employee bumping into job #359 when a change in line speed resulted in the posting of all the jobs on that line. The complainant later returned to job #359 for a period of twenty days when the employee who had displaced him went on an extended vacation. Job #361 is a line job which requires constant standing and does not allow frequent position changes. Although the complainant expressed a willingness to attempt to perform that job, its requirements appear to be beyond the limitations set forth in the August 10, 1983 letter from the W.C.B. Hospital and Rehabilitation Centre. Near the end of the meeting, Mr. Blake advised the complainant that he was being released by the Company since there was no jobs available that he was capable of performing, but emphasized that this termination was a "non-punitive" release from employment and not a disciplinary discharge. When Mr. Christensen expressed the view that the Company was acting within its rights under the collective agreement, the complainant, who was becoming increasingly upset by what he perceived to be a failure on the part of Messrs. Christensen and Karpow to attempt to represent his interests and preserve his employment with the Company, criticized them for failing to "fight" for him and told them to

“get the hell out”. He also accused them of being prejudiced against him because he was Yugoslavian, and stated that he was going to get a lawyer to represent him.

12. The Workers’ Compensation Board subsequently awarded the complainant a lump sum award and a monthly payment for his 15% disability. He was also awarded a temporary supplementary payment to assist him during a six month period of rehabilitation commencing on January 24, 1984.

13. No grievance was filed by the Association on behalf of the complainant concerning his discharge. Mr. Christensen testified that the Association never refuses to file a grievance when requested to do so in a timely fashion by a member of the bargaining unit, even when the Association’s representatives feel that it is a weak grievance (although such grievances may later be “cut off” before arbitration). His explanation for not grieving the complainant’s discharge was that the complainant did not ask him to do so at any time prior to the expiry of the applicable time limit set forth in the collective agreement. When Ralph Potwarka (the lawyer initially retained by the complainant concerning his discharge) telephoned Mr. Christensen near the end of August to ask if a grievance had been filed on behalf of the complainant, Mr. Christensen replied that no grievance had been filed because there had been no request. When Mr. Potwarka said, “How about now?”, Mr. Christensen replied, “We still don’t have a request”, and went on to note that there was a time limit which had expired. Mr. Potwarka then requested a copy of the collective agreement and Mr. Christensen arranged for it to be mailed to him by Charles Losier, the Vice-President of the Association.

14. There are a number of circumstances present in this case which cause the Board concern in the context of section 68 of the Act. Mr. Blake and Mr. Christensen both testified that they reviewed all of the Company’s light duty jobs before concluding that no such position was available on August 12, 1983. However, under cross-examination by counsel for the complainant, they contradicted one another concerning why the light duty clipboard ticking job which had been offered to the complainant two months earlier was no longer available. Mr. Blake testified that that job had been filled by another employee who was “off on compensation for a long time”. It was also his evidence that the employee was still doing the job in question as of the date of hearing of this matter. However, he was unable to recall whether the job had been filled by that employee (or by anyone else) at any time during the period from June 14 to August 12, 1983. Mr. Christensen, on the other hand, testified that the job in question was filled for one day by another employee and then ceased to exist. The contradictory and generally satisfactory evidence adduced by the Association (through the testimony of Messrs. Blake and Christensen) concerning the availability of that position on August 12, 1983 stands in marked contrast to the detailed evidence adduced concerning the offer of that very position to the complainant on June 14, 1983. Since it was not suggested that the complainant, who was acting on the medical advice of his physician, had improperly declined to accept that position on June 14, 1983, it is difficult to understand why greater attention was not devoted to the availability of that position on August 12, 1983 after the complainant had completed his period of assessment and treatment at the W.C.B. Hospital and Rehabilitation Centre, following consultation with the specialist to whom he had been referred by his physician. Moreover, while the Association may not be censurable for agreeing with the Company’s view that the limitations set forth in the August 10, 1983 letter from the W.C.B. Hospital and Rehabilitation Centre precluded the complainant from performing his regular job (#361), it can be justly criticized for acquiescing in the Company’s action of peremptorily

discharging the complainant without affording him any opportunity to supply the doctor's certificate contemplated by Article 16.7 of the applicable collective agreement, which provides in part as follows:

[16.7] Absence Due to Accident or Illness

An employee with seniority absent due to accident or illness shall continue to accumulate seniority and shall return to the position held prior to absence or to one of equal rating providing they possess the ability and physical fitness to qualify for that position.

The absent employees' [sic] reinstatement shall be conditional upon him supplying a doctor's certificate when requested by management before returning to work, certifying that he is physically able to do the work required.

Indeed, on the basis of the evidence as whole, while Mr. Christensen gave some consideration to the availability of light duty work on August 12, 1983 and to the complainant's physical ability to perform his regular job at that time, we conclude from our assessment of all the evidence that neither Mr. Christensen nor any other representative of the Association put their minds in any meaningful way to the vital issue of whether a (non-disciplinary) discharge of the complainant by the Company was justifiable under the circumstances.

15. Article 8.1 of the collective agreement precludes the Company from discharging any employee without notice except "for cause", and Article 8.3 expressly makes a wrongful discharge a grievable matter which (except in the case of a probationary employee) can ultimately be referred to a board of arbitration (pursuant to Article 7.1). Even a rather cursory review of the applicable arbitral jurisprudence would have revealed to the Association's representatives that to justify the discharge of an employee with substantial seniority on the basis of innocent absenteeism, an employer must generally establish not only undue absenteeism in his past record, but also that the employee will probably not be able to provide reasonable regularity of attendance in the future. (See, for example, Brown and Beatty, *Canadian Labour Arbitration* (Agincourt: Canada Law Book Limited, 1977) at pages 302-308; Palmer, *Collective Agreement Arbitration in Canada* (Toronto: Butterworths, 2nd Ed. 1983) at pages 409-414 and 420-425; *Re Falconbridge Nickel Mines Ltd. and Subdury Mine, Mill and Smelter Workers Union, Local 598* (1978), 18 L.A.C. (2d) 293 (Brown); *Re American Standard, Division of Pottery & Allied Workers* (1977), 14 L.A.C. (2d) 140 (Burkett); *Re Norton Co. of Canada Ltd. and U.A.W. Local 397* (1977), 14 L.A.C. (2d) 60 (Hinnegan); *Re National Auto Radiator Manufacturing Co. Ltd. and United Automobile Workers, Local 195* (1976), 11 L.A.C. (2d) 48 (Brandt); and *Re Atlas Steels Co. and Canadian Steelworkers' Union, Atlas Division* (1975), 8 L.A.C. (2d) 350 (Weatherill)). Association officials did not even request the Company to defer the complainant's discharge and permit him to at least temporarily maintain his status as a non-active employee awaiting the availability of (non seniority stream) light duty work or (seniority stream) regular work within his physical capabilities. Thus, they permitted the Company to terminate without challenge the employment of an employee with over nine years' seniority, despite the fact that the most recent evidence of his physical condition (as set forth in the aforementioned letter dated August 10, 1983) indicated that he was

“fit for a full-time job allowing frequent position changes, with limited low level work, limited bending and no lifting over 10 kgs.” Although those restrictions precluded the complainant from performing some of the jobs in the plant, there were a number of other jobs that were within his capabilities and that might have become available to him as a result of job postings, discharges, resignations, deaths, creation of new positions, or other changes in the composition of the Company’s workforce.

16. Although the complainant did not expressly request the Association to file a grievance on his behalf, it is apparent from the evidence as a whole that he was implicitly, if not explicitly, asking Messrs. Christensen and Karpow at the August 12th meeting to fight for him by taking all necessary steps to advocate his interests, attempt to obtain light duty work for him, and preserve his employment with the Company. The complainant’s angry direction that Messrs. Christensen and Karpow “get to hell out” was precipitated by his frustration with the fact that instead of vigorously supporting his interests, the Association representatives readily agreed with the Company’s position and acquiesced in the peremptory termination of his employment.

17. When he was subsequently contacted (within two weeks after the discharge) by the lawyer whom the complainant found it necessary to retain in an effort to regain his employment with the Company, Mr. Christensen raised the time limit contained in the collective agreement as a potential barrier to filing a grievance at that point in time. He did not indicate to the lawyer at that time, or to the Board during his testimony in respect of this complaint, that he had given any consideration to such material issues as whether the applicable time limit was mandatory or merely directory, whether the Company would waive the time limit, or whether an arbitrator would extend the time for filing a grievance, pursuant to section 44(6) of the *Labour Relations Act*. Although a failure to consider such matters might be understandable in the case of an inexperienced union official such as a novice steward, it is much less easily excused in the case of an experienced union official such as Mr. Christensen, who holds a full-time paid position as the President of the Association.

18. While some of the aforementioned matters, if considered in isolation, might be found to constitute mere errors in judgment, mistakes, or negligent acts or omissions falling beyond the scope of section 68, taken as a whole in the context of the discharge of an employee with over nine years’ seniority, they lead the Board to conclude in the circumstances of this case that the perfunctory manner in which the Association handled the situation contravened section 68 of the Act, which proscribes a trade union, such as the Association, from acting in a manner that is arbitrary in the representation of a bargaining unit employee. While the Association had adequately represented the complainant’s interests on previous occasions, its treatment of his August 12, 1983 termination of employment was in our view so summary and perfunctory, as to be unworthy of protection.

19. The remedy requested by counsel for the complainant is reinstatement of his client with compensation for all losses to date. However, we do not find such remedy to be appropriate. Whether the complainant is entitled to any such relief is a matter to be determined by a board of arbitration constituted in accordance with Article 7 of the collective agreement, or a single arbitrator appointed under section 45 of the *Labour Relations Act*. The remedy which we find to be appropriate in the circumstances of this case is to direct the Association to file a discharge grievance on behalf of the complainant and to process it through the grievance procedure. If that grievance is not settled at any stage of the grievance procedure to the

satisfaction of all parties to this complaint, then it shall be referred to arbitration by the Association. The Association (and the complainant) shall be represented at the arbitration hearing by a lawyer or other representative mutually satisfactory to the complainant and the Association, at the Association's expense. The respondent Company will be directed to waive any preliminary objections to a hearing on the merits in order to ensure that issues such as timeliness do not preclude such hearing. In the event that a settlement by the parties or an arbitration award provides for compensation to be paid by the complainant, the Board will remain seized of this complaint for the purpose of entertaining the representations of the parties with respect to the amount of such compensation which is to be borne by the Association. We will also direct that the Association post a Board notice on the plant bulletin board provided by the Company (pursuant to Article 25 of the collective agreement) for the display of Association notices and material. This notice will serve to inform other bargaining unit employees of the disposition of this case and provide them with an element of assurance that the Association will not in the future contravene section 68 in the representation of any bargaining unit employee.

20. For the foregoing reasons, the Board, pursuant to section 89(5) of the *Labour Relations Act*, hereby orders, notwithstanding the provisions of the collective agreement binding upon the parties hereto:

- (1) that the respondent Association forthwith file on behalf of the complainant a grievance protesting his August 12, 1983 discharge by the respondent Company, and duly process such grievance through the grievance procedure set forth in the collective agreement;
- (2) if the grievance is not settled at any stage of the grievance procedure to the satisfaction of all parties to this complaint, that the respondent Association refer the grievance to arbitration for a hearing on its merits, and that the respondent Company take all steps necessary to have the grievance arbitrated on its merits, and waive any preliminary objections to such hearing on the merits;
- (3) that the respondent Association take all steps necessary to assure that it and the complainant are represented at the arbitration hearing by a lawyer or other representative mutually acceptable to the complainant and the respondent Association, at the Association's expense; and
- (4) that the respondent Association post a copy of the attached notice marked "Appendix", duly signed by a representative of the respondent Association, on the plant bulletin board provided by the respondent Company (pursuant to Article 25 of the collective agreement) for the display of Association notices and material; keep the notice posted for sixty consecutive working days; and take reasonable steps to ensure that the notice is not altered, defaced, or covered by any other material.

21. In the event that a settlement by the parties or an arbitration award provides for compensation to be paid to the complainant, the Board will remain seized of this complaint for the purpose of entertaining the representations of the parties with respect to the amount of such compensation which is to be borne by the Association. The Board also remains seized

of this complaint for the purpose of resolving any matter arising out of the interpretation or implementation of the above order.

DECISION OF BOARD MEMBER W.H. WIGHTMAN;

1. Notwithstanding it being an independent local union, The Schneider Employees Association, provides its members the services of a full-time president and has succeeded in negotiating special employment provisions and opportunities for members who become incapable of performing regular bargaining unit jobs. As reflected in the majority decision, on agreement of the parties, these particular jobs are not subject to bumping or other implications flowing from the seniority provisions of the agreement and, if not unique, are at the very least not commonly found in collective agreements.
2. With respect to the complainant, this union has given him effective representation both in the matter of his attendance record and, more particularly, in two instances (fighting and horseplay) wherein the union succeeded in getting the Company to agree to substantial modifications in penalties it had intended to impose.
3. For its part the Company has in place an operative and formalized program to deal with absenteeism. The effect of this program would, I feel, satisfy the classical arbitral concept that for disciplinary action to be acceptable it must have as its primary objective the salvaging of the employee concerned with termination of employment being the final result only if efforts to salvage prove futile.
4. Indeed, in co-operation and through negotiations with the Association, the Company has gone so far as to identify certain jobs which are less demanding in one respect or another and to which at least some employees who are temporarily or partially incapacitated may be assigned until they are capable of performing regular bargaining unit duties. The light duty assignment referred to in paragraph 14 of the majority award was one such "job". It was a non-productive make-work project having all the earmarks of government "job creation" schemes, the only difference being that in this case the Company was prepared to bear cost rather than the taxpayers. I accept Harold Blake's evidence that "the longer they are away, the harder it is to get them back", and based on this perception the Company is prepared to absorb some non-productive costs. I assume, however, there is some limitation on this largesse and that it would stop short of taking the Company into bankruptcy.
5. I further accept Mr. Blake's testimony when he tells us, with respect to the August 12, 1983 meeting: "We received a letter from W.C.B. (Exhibit #9). I set a time for Vic to come in with the President and Chief Steward to make sure I wasn't missing a place in the plant where he could perform *given the W.C.B. limitations*" (my emphasis). And later; "We discussed the W.C.B. letter and decided there was no job which met those conditions". The prospect of bumping was also alluded to as having been discussed at this meeting but, in light of the medical evidence before the parties, it is clear the complainant would not have been able to perform a regular assignment even if the collective agreement had permitted him to bump someone.
6. It seems to me the very essence of the August 12th meeting, although initiated by a Company official, was an exercise wherein both the Company and the Association turned

their minds to an exhaustive canvassing of the alternatives only to arrive at the conclusion that indeed there was no "place in the plant where he could perform" that was open to him. I therefore cannot agree with the conclusion arrived at by the majority at the end of paragraph 14.

7. As to conflicts in the evidence this Board, as does any tribunal, is frequently obliged to assess the variances of recollection as between witnesses and does so without having to conclude that one or another party is lying. The complainant in this matter does not help his own credibility by testifying to having asked Blake for his "regular job" at the August meeting despite the W.C.B. letter as to his condition and upon learning that no light duty jobs were available.

8. As a Board, I believe we are in agreement that the duty of fair representation, while it does not require the union to win at arbitration or even to proceed to arbitration if it can be demonstrated a reasonable assessment of the merits of the case was made, does require the union to make such an assessment no matter how lacking in merit the complaint would appear on its surface. I view the August meeting, involving both Company and Association officials, as being a full and considered assessment by both the Association and the Company. At the conclusion, when the complainant told the Association to go to hell, his instructions were accepted figuratively and, to my mind, with good reasons.

9. I would not, perhaps, feel as strongly about this case were it not standing against the background of a comprehensive and, to say the least, compassionate program to deal positively with the problem of absenteeism, and more particularly the numerous occasions upon which the Association has effectively intervened on behalf of the complainant including, in my view, on the event giving rise to this complaint. I fear the effect of this decision could lead the parties to the collective agreement to consider retreating to a safer but less compassionate approach to dealing with partially incapacitated employees.

10. For the above reasons I would have dismissed the complaint.

Appendix

The Labour Relations Act

NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

WE, THE SCHNEIDER EMPLOYEES ASSOCIATION, HAVE POSTED THIS NOTICE IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD ISSUED AFTER A HEARING IN WHICH WE AND THE COMPANY PARTICIPATED. THE ONTARIO LABOUR RELATIONS BOARD FOUND THAT WE VIOLATED THE LABOUR RELATIONS ACT AND HAS ORDERED US TO INFORM ALL EMPLOYEES IN THE BARGAINING UNIT OF THE FOLLOWING INFORMATION.

THE ACT GIVES INDIVIDUAL EMPLOYEES THESE RIGHTS:

TO BE REPRESENTED BY A TRADE UNION AND TO PARTICIPATE IN ITS LAWFUL ACTIVITIES.

TO BE REPRESENTED BY A TRADE UNION IN A WAY THAT IS NOT ARBITRARY, DISCRIMINATORY OR IN BAD FAITH, WHETHER OR NOT THEY ARE MEMBERS OF THAT TRADE UNION.

WE ASSURE ALL EMPLOYEES REPRESENTED BY THE SCHNEIDER EMPLOYEES ASSOCIATION THAT:

WE WILL NOT DO ANYTHING THAT INTERFERES WITH THESE RIGHTS;

WE WILL NOT ENGAGE IN ANY CONDUCT THAT IS ARBITRARY, DISCRIMINATORY OR IN BAD FAITH IN THE REPRESENTATION OF ANY BARGAINING UNIT EMPLOYEE.

WE WILL COMPLY WITH ALL ORDERS OF THE ONTARIO LABOUR RELATIONS BOARD.

WE WILL FORTHWITH FILE ON BEHALF OF VUKOTA VUJICIC A GRIEVANCE PROTESTING HIS AUGUST 12, 1983 DISCHARGE BY THE COMPANY, AND DULY PROCESS SUCH GRIEVANCE THROUGH THE GRIEVANCE PROCEDURE. IF THE GRIEVANCE IS NOT SETTLED AT ANY STAGE OF THE GRIEVANCE PROCEDURE TO THE SATISFACTION OF ALL PARTIES, WE WILL REFER THE GRIEVANCE TO ARBITRATION FOR A HEARING ON ITS MERITS. WE WILL TAKE ALL STEPS NECESSARY TO ASSURE THAT THE ASSOCIATION AND MR. VUJICIC ARE REPRESENTED AT THE ARBITRATION HEARING BY A LAWYER OR OTHER REPRESENTATIVE MUTUALLY ACCEPTABLE TO THE ASSOCIATION AND MR. VUJICIC, AT THE ASSOCIATION'S EXPENSE.

WE WILL PAY TO MR. VUJICIC SUCH COMPENSATION AS MAY BE ORDERED BY THE ONTARIO LABOUR RELATIONS BOARD.

THE SCHNEIDER EMPLOYEES ASSOCIATION
PER: _____

This is an official notice of the Board and must not be removed or defaced

This notice must remain posted for 60 consecutive working days.

2742-82-R International Brotherhood of Electrical Workers Local Union 1687, (“I.B.E.W. Local 1687”), Applicant, v. **Kidd Creek Mines Ltd.**, Respondent, v. **United Steelworkers of America**, (“the Steelworkers”), Intervener

Bargaining Unit – Practice and Procedure – Craft unit provision intended only to protect already established craft representation rights – IBEW failing to show it “commonly” bargained separately and apart for maintenance electricians in mining or manufacturing industries – Craft status denied – Board analysing meaning and purpose of craft unit provision in Act

BEFORE: R. O. MacDowell, Vice-Chairman, and Board Members J. A. Ronson and P. J. O’Keeffe.

APPEARANCES: *A. M. Minsky, Q.C., B. Fishbein, L. Popovitch and D. Lounds for the applicant; F. G. Hamilton, Q.C., D. F. Grenville and R. Willoughby for the respondent; Brian Shell and Jack de Klerk for the intervener.*

DECISION OF THE BOARD; March 23, 1984

I

1. This is an application for certification.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
3. The respondent is a mining company which has carried on business in Ontario, under various corporate names, since 1966. The operations with which we are concerned are located in the City of Timmins, and consist of a mine site in Kidd Township, and a metallurgical complex in Hoyle Township interconnected by a 32 mile railway operated by the company. The mine site is a base metal mine extracting a variety of ores. The ore deposit was originally an open pit operation but now consists of two underground shafts. The ore is transported by rail to a metallurgical site for crushing, milling, refining and smelting, in a large modern complex that includes laboratories and office buildings. The company’s facilities are among the most advanced in the world. Its production equipment is complex and highly sophisticated.
4. The Timmins operation has an employee complement of about 2,800, split equally between the two locations. There are approximately 800 persons employed in the maintenance function, of whom 106 are electricians. The vast majority of those electricians have a provincial “certificate of qualification”. A number also have specialized electronics training beyond that required for the basic certificate of qualification, as well as certain “cross trades” training in skills typically used by other tradesmen.
5. Apart from electricians, the company employs in its maintenance function, large numbers of other skilled tradesmen, including: millwrights, welders, pipe/gas fitters, plumbers, machinists, carpenters, painters, masons, etc. In addition, the maintenance department includes numerous semi-skilled and unskilled classifications as well as various technicians, technologists, quality control personnel, expeditors, planners, engineers, clerical and supervisory

staff. Given the nature of the maintenance function, electrical crews will regularly work side by side with other tradesmen or employees in the maintenance department. The electricians work throughout the entire operations. They may receive direction from any number of foremen. The electricians report primarily, but not exclusively, to electrical foremen with the same background as themselves.

6. We might note that when this case was originally scheduled for hearing, the Board, differently constituted, granted the United Steel Workers of America ("the Steelworkers") limited "amicus curiae" status to intervene and make representations. The Steelworkers did not represent any of the electricians, nor was it seeking to do so. There was no certification application wherein the Steelworkers were seeking to represent any of the respondent's employees. However, the United Steelworkers of America is the dominant union organization in the mining industry, and, where organized, maintenance electricians typically fall within the Steelworkers' industrial bargaining unit. The original panel of the Board was persuaded that the Steelworkers had a sufficient contingent interest in the outcome of this case to warrant entertaining its representations on the legal and policy issues which it raises.

II

7. The main issue in this application is whether the group of electricians whom the union seeks to represent, constitute, by themselves, a unit of employees appropriate for collective bargaining. The applicant union claims that they do, and relies upon section 6(3) of the Act. The union claims that the company's maintenance electricians constitute a *craft* unit which is *deemed* to be appropriate. In the alternative, the union argues that the electricians share a separate and distinct community of interest, so that they would constitute an appropriate unit even under the broader discretionary provisions of section 6(1). The employer rejects both contentions. It argues that the union cannot meet the requirements of section 6(3), and that the only bargaining unit "appropriate" is an "industrial" unit comprising all of the employer's production and maintenance employees. The relevant provisions of the Act read as follows:

6.(1) Subject to subsection (2), upon an application for certification, the Board shall determine the unit of employees that is appropriate for collective bargaining, but in every case the unit shall consist of more than one employee and the Board may, before determining the unit, conduct a vote of any of the employees of the employer for the purpose of ascertaining the wishes of the employees as to the appropriateness of the unit.

• • • •

(3) Any group of employees who exercise technical skills or who are members of a craft by reason of which they are distinguishable from the other employees and commonly bargain separately and apart from other employees through a trade union that according to established trade union practice pertains to such skills or crafts shall be deemed by the Board to be a unit appropriate for collective bargaining if the application is made by a trade union pertaining to such skills or craft, and the Board may include in such unit persons who according to established trade union

practice are commonly associated in their work and bargaining with such group, but the Board shall not be required to apply this subsection where the group of employees is included in a bargaining unit represented by another bargaining agent at the time the application is made.

8. As will be seen, there are three conditions which a union must meet in order to bring itself within the craft unit provisions of section 6(3):

1. The group of employees whom the applicant seeks to represent must be employees who exercise technical skills or who are members of a craft by reason of which they are distinguishable from other employees;
2. the group of employees must commonly bargain separately and apart from other employees through a trade union that according to established trade union practice pertains to such skills or crafts;
3. the application must be made by a trade union which pertains to such skills or craft.

If those conditions are met, the Board is required to find the craft unit to be appropriate. Section 6(3) is mandatory. Conversely, if the applicant union fails to meet any one of these conditions, section 6(3) has no application at all. With this in mind, the parties agreed to focus initially on the so-called "second test" (item 2 above) and hear the union's evidence on its established bargaining practices. In the Board's experience, this is the barrier upon which craft claims most frequently founder, and seemed a sensible place to start. If the union could not meet the second test, it would not be necessary to consider the other aspects of section 6(3).

9. The hearings consumed a number of days and the union tendered voluminous oral and documentary evidence concerning its bargaining practices in Canada and the United States. Much of that evidence consisted of collective agreements which, it was said, showed that, in a number of industries, the I.B.E.W. represents bargaining units of maintenance electricians who commonly bargain separately and apart from other employees. The union's position was that it has a well-established and widespread practice of bargaining separately for maintenance electricians and that it was therefore unnecessary to show that it has a special or particular practice of bargaining separately for electricians employed in the mining industry.

10. The introduction of these agreements was strenuously resisted by the respondent employer on a number of grounds: that the agreements were irrelevant unless they showed an established practice of separate bargaining *in mining*; that the agreements – particularly the American ones – were irrelevant because they did not pertain to bargaining practice *in Ontario*; and that some of the agreements should not be admitted at all because the individual introducing them had no direct knowledge of the bargaining situations to which they related.

11. Many of the agreements were put in by Don Lounds, a union official who was responsible for reviewing collective agreements from across Canada prior to sending them to the union's head office in the United States. Mr. Lounds is familiar with the contents of these agreements because he is called upon to read them, but he did not necessarily have any personal knowledge of the individual bargaining situations. In a number of instances, he had no

direct knowledge of the composition of the bargaining units or the bargaining framework which led to the signing of the collective agreements, other than what might be inferred from reading the documents themselves. He also conceded that the fact that electricians might have a separate collective agreement (i.e., a separate document) did not necessarily mean that the agreement resulted from *separate bargaining* by electricians, nor was it easy to determine whether the bargaining unit defined in a number of these collective agreements covered only electricians or a mixture of craft and non-craft employees. Either situation might arguably diminish the force of the union's argument that it commonly bargained separately and apart for electricians. Some of these details were eventually supplied by other union officials with experience in Ontario and other parts of Canada, but at the end of the union's case there was no similar supporting evidence respecting the American agreements. Mr. Lounds explained that he had obtained those agreements by writing to the union's collective agreement library in the United States and he knew no more about them than could be gleaned from their terms.

12. While there was considerable merit to the employer's submission, the Board ruled that it would receive the disputed documentary material subject to later argument as to the weight (if any) which should be given to it. We were not disposed to alter the approach first enunciated by the Board in *Art Wire & Iron Ltd. et al.* 54 CLLC ¶17,080. In that case two locals of the Ironworkers' union sought to represent separate craft units of "inside" and "outside" workers, but found it difficult to establish a history of separate bargaining for the former group in Ontario. It could, however, point to a history of separate bargaining on this basis in the United States. The respondent, as in the instant case, argued that such evidence was irrelevant to the construction of an Ontario statute. But the Board disagreed:

In so far as the United States is concerned, we find on the evidence submitted that there is an established trade union practice there for architectural and ornamental iron workers to bargain separately and apart from other employees through the International Association of Bridge, Structural and Ornamental Iron Workers or its locals. In Canada, a similar bargaining pattern is emerging but it cannot be said that the practice in this regard has gained widespread or general acceptance in this industry in Canada. We would hesitate to say on the evidence presented that the practice has become established in Canada or in Ontario. We are of the opinion, however, that the applicant, Local #721, does not have to rely in these cases solely on the practice in Ontario. Subsection (2) [now (3)] of section 6 does not contain any geographic limitations, undoubtedly in recognition of the facts of economic life on this continent. Conditions which give rise to certain industrial patterns in the United States usually find their counterpart in Canada. Since both industry and trade unions cross the border without let or hindrance, it is inevitable that a trade union habituated to certain modes of organizing or bargaining in the United States will seek to follow them in Canada; experience has shown that any bargaining practice that becomes an integral part of industrial relations in the United States will in due course be reflected in the Canadian scene. To erect a barrier against the introduction of such a practice into Canada will usually only lead to industrial strife and we fail to see the wisdom of such a course unless it can be shown that the practice would be harmful to the public interest. There is nothing in the evidence that would warrant us in coming to the conclusion that such harm

would be done if we were to recognize the “craft” status of Local #721 in this industry. Indeed, if we were to adopt any other principle than the one indicated, we would in effect be saying that no international trade union having craft characteristics which had not heretofore endeavoured to organize employees in Canada can ever claim the benefits conferred by subsection (2) of section 6.

13. No doubt in the 30 years since *Art Wire* there has been some divergence between Canada and the United States in collective bargaining practice and legislative policy. The spillover of American practices may no longer seem as inevitable as it once was, and American precedents may no longer be as useful. However, so long as Canadian employees are members of international unions, our collective bargaining system is influenced by North American economic trends, and our legislation remains roughly similar to that of the United States, American collective bargaining experience will be arguably relevant. In our view, it is not so much a question of relevance but of weight. Evidence from foreign jurisdictions may not be as persuasive as evidence of collective bargaining practices closer to home; moreover, reference to this broader context can be a double-edged sword. It may, as in *Art Wire*, permit the Board to conclude that separate bargaining is “common” even if it is uncommon in Ontario. On the other hand, if one has to go far afield to find examples, or if in surveying this much broader range of collective bargaining experience one still finds only a few instances of separate bargaining, these few instances will appear all the more unusual, infrequent, rare, unique, extraordinary, or, in short, *uncommon*. If the collective bargaining canvass is to include both Canada and the United States, a few cases from the latter jurisdiction will not establish the “widespread and generally accepted” practice considered by the Board in *Art Wire* to be necessary. Likewise, the absence of direct knowledge of the bargaining situations goes to the weight of the evidence which the union has submitted, rather than whether it should be received at all. We prefer to treat the collective agreements rather like “business records” commonly filed by employers, since from a practical point of view it would be very difficult to assemble witnesses from all over North America, or find someone with personal knowledge of a longstanding bargaining relationship which may stretch back over forty years. However, as will be seen below, the absence of such evidence may significantly diminish the weight to be accorded to the documentary material submitted.

14. It is neither necessary nor practical in these reasons to attempt to reproduce all of the details of the union’s oral and documentary evidence. It is sufficient to give an overview of the collective bargaining situations and agreements relied upon, and for ease of reference, these will be grouped together on an industrial basis. Since the whole purpose of this evidence is to establish that maintenance electricians commonly bargain separately and apart, we shall emphasize those features of the documentary evidence (and supporting testimony where applicable) which bear specifically on this issue. We should state at the outset, however, that what we found particularly interesting is: the number of instances where the agreements filed by the union are the result of common bargaining with other trades and/or production employees; and the number of instances where the group of employees on whose behalf the I.B.E.W. bargains, includes persons who are *not* certified electricians or apprentices. In other words, within their own units the electrician members of the unit bargain together with other employees who, strictly speaking, are not members of the craft, and at the employer level, the I.B.E.W. units bargain together with other skilled or unskilled employees in the enterprise. Of course, the fact that the I.B.E.W. may find it expedient to negotiate in conjunction with other unions may not weaken its claim to a craft unit under section 6(3); nor would the Board

wish to create a disincentive to engaging in joint bargaining. However, it does underline the extent to which collective bargaining realities have compelled the I.B.E.W. to simulate an "industrial" bargaining model.

III

15. The largest group of agreements filed by the union are in the pulp and paper industry, where the I.B.E.W. has had a presence for many decades – in fact, well before the existence of collective bargaining legislation and the widespread organization of industrial unions. The pulp and paper mills were often located in remote areas, beyond the reach of established electrical power transmission lines, and, consequently the companies had to generate their own electricity. It appears that these power stations provided the I.B.E.W. its first foothold in the industry which it later extended into the mills themselves. At the time, the production employees were largely unorganized, although the skilled employees may have been represented by one or more craft unions. The oral evidence was that the I.B.E.W. presence dates in some cases to the 1920's and 1930's, and the agreements filed with the Board indicate that the I.B.E.W. continues to represent electricians employed in the installation, maintenance repair, and sometimes operation, of electrical equipment in the employer's mills and power plants. This, the union argues, establishes its practice of separate bargaining through various of its local unions across Canada. But on closer scrutiny, the picture is much less clear.

16. The agreement with Abitibi Price at Iroquois Falls includes the classification of powerhouse operator, electric utility cleaner, mechanic wheelman and lineman. The Abitibi Price agreement at Port Arthur includes the classification motor oiler. In both cases the agreement appears to cover individuals who are not certified electricians. The Abitibi Price Pine Falls agreement, on its face, refers to a number of other trades and the recognition clause includes a reference to the United Paperworkers' International Union, Local 1375, as well as I.B.E.W. Local 658. William Brazeau, an I.B.E.W. official, admitted that this document was the result of common bargaining with the International Association of Machinists ("I.A.M.") which, together with the I.B.E.W., represents employees in the maintenance department. And, ironically, the small I.B.E.W. unit has relatively recently been absorbed into the larger industrial unit. It no longer exists. This is one of several examples of a *declining* I.B.E.W. presence in the industry.

17. The agreement with Bowater Newfoundland Limited at Corner Brook appears to be the result of joint negotiations between the company and I.A.M. Local 1567 and I.B.E.W. Local 404. There is a joint recognition provision and a reference to both unions on the cover page of this agreement. On its face, it is not an example of totally independent or separate bargaining by electricians apart from other employees.

18. The agreement between I.B.E.W. Local 559 and Boise Cascade at Kenora and Fort Francis is also the result of co-ordinated bargaining with a number of trade unions, including two locals of the Canadian Paperworkers' Union ("C.P.U."), the I.A.M., the I.B.E.W., and the Office and Professional Employees' International Union ("O.P.E.I.U."). Changes to the unions' collective agreements are made in tandem, there are common provisions, and there is a common memorandum of settlement. There is a single spokesman in bargaining for all unions participating and a joint recommendation from the bargaining team for the agreement's acceptance or rejection. There is common voting, but if the I.B.E.W. rejects the package, it is said, there would be no collective agreement with that union. However, it appears that such

possibility is remote. All of the constituent unions agree on changes to the central issues and any disagreements are worked out between them so that the various unions can present a “common front” to their employer. On one of the documents, a purported extension agreement, the names of a number of locals appear, including those of the C.P.U. and O.P.E.I.U. – two unions which organize on an industrial model. The Boise Cascade agreement with Local 559 at Kenora also includes powerhouse operators. The evidence does not clearly establish that those individuals are or must be certified electricians.

19. The recognition provisions of the collective agreement document between I.B.E.W. Local 1150 and Bathurst Division of Consolidated Bathurst, at Bathurst, New Brunswick also mentions I.A.M. Local 1505, the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (“U.A.”) and the International Union of Operating Engineers’ (“I.U.O.E.”) Local 894. The signing page of the collective agreement includes all four unions as does the attached memorandum of settlement. The only reasonable inference is that this agreement results from common rather than separate bargaining.

20. In the agreement between I.B.E.W. Local 2041 and Domtar Packaging at Red Rock, Ontario, there are common letters of understanding with various unions appended to the back of the agreement. Although no other agreements from these other unions were filed, there is certainly some form of common understanding and, it would seem, some common interpretation and application of common terms.

21. The agreement between I.B.E.W. Local 1888 and Irving Pulp and Paper Limited at Saint John, New Brunswick is framed in terms of “all employees”, save and except a number of employees represented by the Canadian Paperworkers Union. This agreement is not a “pure” electricians’ unit either. It purports to include boiler operators, turbine operators, recovery assistant, demineralizer operator, recovery helper, power boiler helper, utility man – steam plant, and a variety of operators. We do not have direct and specific evidence as to which of these classifications involve certified electricians but, on the surface, it would appear that at least some of these employees are not certified electricians. In the absence of direct evidence to the contrary we so find.

22. The agreement between I.B.E.W. Local 1149 and Kimberly-Clark at Kapuskasing includes helpers, cleaners, oilers, and utility men whom, we are told, would not be certified electricians. The document also mentions other trades. For the Kimberly-Clark agreement at Terrace Bay, there is a common memorandum of settlement with the United Paperworkers’ International Union (U.P.I.U.) and Mr. Lounds agreed that this implied that there was common rather than separate bargaining. Jack King, another I.B.E.W. representative, confirmed that at least the last two agreements have been jointly negotiated at the same bargaining table with the U.P.I.U. Although there were separate ratification procedures, there was only one document with the same across-the-board percentage wage increase and a number of common clauses, on items such as wages, welfare, insurance plans, shift premiums, call-in pay and statutory holidays. Mr. King pointed out that it was possible for one union to reject the proposal or go it alone. As a practical matter it is not likely.

23. The agreement between I.B.E.W. Local 2354 and MacMillan Bloedel at Port Alberni, British Columbia is interesting for another reason. It clearly does relate to a unit of

maintenance electricians. But that unit may not last much longer. There is currently a proceeding before the British Columbia Labour Relations Board to merge this unit into the larger industrial bargaining unit in order to avoid the collective bargaining problems which, the company claims, arise from fragmented bargaining. If successful, this too will diminish the I.B.E.W.'s presence in the pulp and paper industry.

24. The agreement between Price Pulp and Paper at Grand Falls, Newfoundland and I.B.E.W. Local 512 is a common agreement between the company, the I.B.E.W. and the I.A.M. Both unions appear on the common front page, in the recognition clause, and throughout the agreement.

25. In the agreement between I.B.E.W. Local 1149 and Spruce Falls Power and Paper at Kapuskasing there are a number of trade unions purportedly signing and a number of crafts listed on the document. Mr. King testified that for many years there was joint bargaining with the C.P.U., although not in the last agreement. He testified that reference in the document to non-electrical job titles was a carry-over from previous years of bargaining.

26. In the agreement between I.B.E.W. Local 914 and Ontario Paper Company at Thorold, the recognition clause recognizes the signatory trade unions: the I.B.E.W., I.A.M., U.A., I.U.O.E., and Carpenters. The I.B.E.W. group includes ground men, motor room cleaner and helpers. The I.B.E.W. unit is not a "pure" craft grouping. In bargaining there is a single spokesman for the five trades, common proposals submitted and agreed to in one document and separate appendices for local issues. The unions' committee decides as a group when the results of bargaining should be taken back to the employees for ratification. Although each union ratifies on its own, no individual trade has ever rejected the proposal. Occasionally, the C.P.U. has also been involved in this bargaining structure. Mr. King testified that all the maintenance activities were covered by a single agreement, the contract provisions are virtually identical for all trades, and that the package is negotiated at one bargaining table.

27. The best evidence before the Board is that there are approximately 170 mines currently operating in Canada. The Steelworkers represent maintenance electricians *in industrial units* at a number of mines. The I.B.E.W. represents electricians at only one: Hudson's Bay Mining and Smelting at Flin Flon, Manitoba. But even here, the unit is not a "pure" craft unit of electricians and the bargaining is not "separate and apart" as one would usually use those terms.

28. The I.B.E.W.'s bargaining rights at Hudson's Bay mining and smelting can be traced back to certificates issued by the Canada Labour Relations Board more than 30 years ago, and it is interesting to note that if these certificates were issued pursuant to craft unit provisions in the federal legislation (the evidence is not clear in this regard) those craft provisions have now been repealed (see *infra*). There are two I.B.E.W. locals involved – Locals 1405 and 1598 – but neither appear to represent a "pure" electricians' unit. Local 1598 represents employees who operate a mechanical rail facility. The employees within its jurisdiction include such non-electrical classifications as: motor man, breakman, crane operator, locomotive engineer, and dispatcher. Local 1405's jurisdiction extends to operators of a coal plant, including: coal pulverizer, hoist man, labourer, cottrell helper. Neither of these groups are limited to electricians and electricians' apprentices. The craft employees bargain with non-craft members of the group. Nor is the bargaining really divorced from that of other company employees. There has been a Council of trade unions which, until recently, included the

Steelworkers. That Council bargains as a group with common proposals, and the committee decides by consensus when to recommend the package to its constituents. In the early 1970's, all of the trades engaged in a common strike. The I.B.E.W. did not bargain or strike separately. Again, there is an attempt to maintain a common front and, in practical terms, there is really only one "bargain" containing parallel changes for all trades and which all unions subscribe to. Thus, the one mine in which the I.B.E.W. does have a bargaining presence is hardly a model of craft bargaining purity.

29. There was no direct evidence concerning the American mining agreements. We are left to draw such inferences as may be gleaned from a perusal of the contract language.

30. The agreement between I.B.E.W. Local 571 and Kennecott Copper in Nevada appears to encompass a unit of both electricians and non-electricians. So does the I.B.E.W. Local 2223 unit at the Magma Copper Company – San Manuel Division, where, according to Mr. Lounds, such classifications as helpers, water treaters, and pump man, would not be part of a typical maintenance electricians' unit. The agreement with the Magma Copper – Superior Division, mentions a settlement with the "Magma Unity Council" and refers to the I.A.M. – references which Mr. Lounds testified "could be" indications of a common bargaining structure. In the absence of evidence to the contrary, we draw that inference. Similarly, in the case of the I.B.E.W. agreement with Duval Corporation in its copper operations in Arizona, Lounds indicated that it could be joint bargaining with six trade unions at one bargaining table. He did not know and could not tell from the collective agreement.

31. The agreement with the Swindell-Dressler Energy Supply Company and I.B.E.W. Local 602 is a little clearer on its face. There is no indication of joint bargaining, however, the recognition clause, article 3, refers to all production and maintenance employees and includes such diverse groups as coal handlers, facility operators and dozer operator. This latter classification, if it means what it says, would usually fall within the craft jurisdiction of the I.U.O.E. This is not a pure electricians' craft unit. It is a unit in which electricians are bargaining together with members of another craft and non-craft employees.

32. At the Utah Copper Division of Kennecott, the agreement with Local 1438 of the I.B.E.W. is said to be based upon an American National Labour Relations Board certificate of 1944. The unit, to the extent which one can discern it from the contract language, includes a whole series of employees who are not engaged in electrical operations, maintenance or repair, including: machinist, boilermaker, power plant operator, crane operator, painter, fly ash machine operator, shopmen, water softener/pump operator, utility man, janitor, and helper. These employees are not separately represented, nor do the electricians bargain separately and apart from them. Again, some of these employees would be unskilled or semi-skilled, and others would be members of another craft.

33. In the case of Inspiration Consolidated Copper Co. Limited and I.B.E.W. Local 518, the memorandum of settlement appears to be between the employer and a number of trade unions. This too implies co-ordinated bargaining in which all unions have signed, at the same time, a single document of the same date, with common terms and conditions of employment. In the case of Inspiration Consolidated Copper Co. Limited, the group represented by the I.B.E.W. includes such classifications as: break-in crane men, excavator operator, crane

man, switchboard operator. In Ontario practice, these classifications would either be represented by the I.U.O.E. or be part of a broader non-craft bargaining unit. They would normally not be included in the electricians' craft unit.

34. A number of the collective agreements submitted do not fit easily into any specific category and can therefore be conveniently dealt with together.

35. The I.B.E.W. filed an agreement with the University of Toronto. It is unique. There are no agreements with any other post-secondary educational institutions (universities, colleges, community colleges etc.). There are, however, two agreements with municipal school boards: Windsor and Toronto. The Windsor Board of Education has quite recently signed a collective agreement covering the two employees that it has employed for years and who were members of the I.B.E.W. We were told that, in effect, this is a first agreement, and of course, we are aware that there are a number of collective agreements, and a number of certificates issued by this Board, in which maintenance employees of school boards or municipalities, including electricians if there are any, are grouped together in "industrial" bargaining units.

36. The Board of Education of the City of Toronto is the only other entity in the educational sector where the I.B.E.W. can claim a presence, but up to the 1980-81 round of bargaining – i.e., the most recent collective agreement – the electricians have bargained through the Toronto and Central Ontario Building and Construction Trades Council which is specifically listed as the contracting party for the employees and unions bound by the collective agreement. That body represents a variety of trades, and the evidence indicates that, although the I.B.E.W. bargained separately in the most recent set of negotiations, for some 17 years before that, it bargained as part of a council of trades. As in the case of the Windsor Board of Education, its history of separate bargaining is relatively recent.

37. The applicant union also submitted an agreement between its Local 353 and the Toronto Star. This is the only agreement which it has with any newspaper in Ontario and there is no indication that it has any agreements with any newspapers anywhere else. We do not need direct evidence to observe that there are dozens of newspapers in this province and dozens of collective agreements in the newspaper industry – often with craft unions. The I.B.E.W. has only one.

38. The purported "Marine agreement" with Canal Electric also stands out as something of an exception. It purports to apply to marine "construction, maintenance, and fabrication of panels to be installed on ships". However, not only was this the only agreement of its kind filed with the Board, and not only does it bear a marked resemblance to activities associated with the construction industry, but the evidence was that the work was in fact currently being done pursuant to the general construction agreement applicable in the industrial, commercial and institutional (ICI) sectors of the construction industry. Canal Electric is also an ICI construction contractor.

39. The union filed two agreements with Catalytic Limited covering that company's activities at the Gulf Petroleum complex in Clarkson, Ontario and the Syncrude project in Mildred Lake, Alberta. Both agreements with Catalytic were said to be representative of what is known as a "General Presidents' maintenance agreement". The union's witnesses testified that there were a number of such standard form agreements with Catalytic and with several other companies which do maintenance work largely in the petroleum industry. None of the

other agreements were actually filed with the Board, and, as we will discuss later, the term “maintenance” has a certain chameleon quality about it: it means quite different things in different contexts. The only common thread is that what is “maintenance” is not “construction” and therefore can be done at rates, and under conditions, different from those prevailing in the ICI agreement. Indeed, it appears that the whole purpose of the General Presidents’ maintenance agreement is to permit subcontractors to compete for work in industrial enterprises which they could not get if they had to pay their employees construction rates, and, which therefore would be done by the purchaser’s own forces.

40. The agreement with Catalytic for the Gulf site provides that the company’s business is “plant maintenance, repair and renovation”. The agreement has been entered into by a number of unions *together* for their mutual benefit. The bargaining unit is described as encompassing “*all employees*” engaged in maintenance, repair and renovation. The trades and unions listed on the face of and bound by the agreement include: asbestos workers, boiler-makers, carpenters, cement masons, electrical workers, ironworkers, labourers, operating engineers, pipefitters, sheet metal workers, and teamsters – a mixture of both traditional craft unions, and the unskilled or semi-skilled workers represented by the Labourers and Teamsters. It is *not* a separate agreement with the I.B.E.W. which does *not* bargain separately and apart.

41. The applicant’s witnesses explained that the General Presidents’ agreement reflects the consensus of a committee of the officials of a number of trades and unions which is entered into with companies engaged in the maintenance field (although Catalytic is also engaged in standard construction work). They testified that the work covered by the “maintenance” agreement is *not* considered construction work, even though, by its terms, the company’s business is listed as including “repair” and “renovation”. The definition of “construction industry” in the *Labour Relations Act* reads as follows:

1.-(1) In this Act,

• • • •

(f) “construction industry” means the businesses that are engaged in constructing, altering, decorating, repairing or demolishing buildings, structures, roads, sewers, water or gas mains, pipe lines, tunnels, bridges, canals or other works at the site thereof.

It is not clear why the “repair” and “renovation” mentioned in the agreement should be different, from the “repair” and “alteration” contemplated in the statutory definition of what constitutes construction.

42. There is no individual or separate bargaining between the I.B.E.W. and Catalytic, nor any bargaining at all with the petro-chemical enterprises (Gulf, Syncrude) for whom, on the evidence, Catalytic supplies services. There is no evidence at all that there is any maintenance work in the mining industry done by subcontractors like Catalytic pursuant to the General Presidents’ maintenance agreement, and very little evidence to indicate that such agreement is applied by maintenance subcontractors outside the petro-chemical industry. Ralph Tersigni testified that the General Presidents’ agreement was applied by the Lummus Company to what Mr. Tersigni described as “maintenance” on a hydro project at Douglas Point. The “maintenance” work in question occupied between ten and forty electricians as well as a

number of other trades for almost four years repairing storm damage, rewiring and reclamping lines in order to increase the level of protection, and replacing large portions of the wiring and electrical conduit. Tersigni maintained that this was not “repair” or “construction” work at all. It was “maintenance”.

43. The I.B.E.W. has approximately 20,000 members in Ontario. Of these, about 10,000 are employed in production bargaining units in the manufacturing sector or by municipal utilities. The employees in these non-craft bargaining units are not all certified electricians or apprentices and the applicant does not rely upon this collective bargaining activity to establish that it commonly bargains separately and apart from other employees for the members of its craft. If such craftsmen are employed in these units, they are clearly grouped together, and bargain together with, other non-craft employees.

44. The other 10,000 I.B.E.W. members in Ontario are generally certified electricians or electricians’ apprentices. The majority of them work under the agreement negotiated pursuant to the province-wide bargaining scheme applicable in the ICI sector of the construction industry (“the ICI agreement”); although in practice this agreement may be applied by employers to other sectors of the construction industry as well. It is also applied to what is described as “maintenance” work done by electrical subcontractors engaged (on various bases) by manufacturing firms. Mr. Tersigni estimated that approximately 3,000 members were doing such “maintenance” work and that electrical subcontractors varied in the extent to which they moved back and forth between “construction” and “maintenance” activities. However, Mr. Lounds conceded that there was no clear distinction between “construction” and “maintenance” work. He said it was, a “grey” area; but in any event, much of the work in question was being done pursuant to the terms of the ICI agreement, by employers who frequently shift back and forth from “the grey area” into what is clearly construction work.

45. The supposed distinction between construction (“repair”) and “maintenance” work is worth some further consideration. Although the focus in the second test is on *bargaining practice*, the union sought to buttress its position by demonstrating that its members frequently did *work* for manufacturing companies. As one witness put it, “electricians are in and out of plants all the time”. Of course, the I.B.E.W. does not *negotiate* with such manufacturing concerns, nor are the electricians in question employees of those concerns. If there is a “bargaining practice” with respect to electricians working in manufacturing, there is certainly no practice of bargaining with those manufacturing concerns. The employees in question are employed by the electrical subcontractors and work pursuant to the province-wide ICI agreement. The bargaining is with the electrical subcontractor. There is no electricians’ bargaining unit in the industrial enterprise, nor are the electricians’ wages and benefits negotiated in relation to the other employees in the plant as would be the case if there were a direct employment or bargaining relationship with the manufacturing enterprise. The employment context is quite different.

46. The other problem is, that in this situation, the term “maintenance work” really has no precise meaning. Not only is such work done pursuant to the ICI agreement at construction rates, but much of it may actually be construction work. The definition of maintenance varies as one moves from I.B.E.W. Local to I.B.E.W. Local; moreover, the witnesses had quite different (and sometimes bizarre) characterizations of work which, in their view at least, was “*clearly*” maintenance – as opposed to construction.

47. All of the witnesses were certain that a small job installing a 220 volt line in a private home to hook up a newly purchased electric clothes dryer was “construction” work. On the other hand, running in lines and establishing lighting at the Canadian National Exhibition for its annual events or its special trade shows was maintenance. So was rebuilding seven transmission towers near Sarnia which had been destroyed by a tornado. The electricians on that job helped build seven new towers based upon salvagable parts, new steel, new lines, and new insulators, and it was conceded that there were structural modifications. But according to the applicant’s witnesses, this work was not repair, renovation or construction. It was maintenance. Mr. Lounds suggested that installing a *new* motor on a *new* concrete base was maintenance. Running lines into a plant, including the removal of old electric poles and the erection of new poles and new lines was described as maintenance. Removing bad sections of underground cable and replacement with new cable was maintenance, not repair. According to Ralph Tersigni, adding to, altering, or increasing the capacity of lines was all maintenance for his Local. When a control room at Noranda Metals in Fergus was destroyed by an explosion, the repairs were not “repair”, but maintenance. Joe Mulhaul suggested that replacing a damaged motor control system or pump system with new ones was maintenance. For Mulhaul, who works in the electrical powers system sector of the construction industry, replacing conductors, installing new poles and transformers and restringing lines into homes in rural areas is maintenance. For Lou Popovitch, whose Local has jurisdiction in northern Ontario, the installation of temporary lighting and power for construction crews working on the respondent’s premises some years ago was maintenance - although, again, done under the ICI agreement. When Rio Algom hired an electrical subcontractor to remove and replace equipment not in production from an abandoned mine, that too was regarded by Mr. Popovitch as maintenance. And we repeat, the employees doing the work are not directly employed in these industrial enterprises, and the I.B.E.W. has no collective bargaining relationships with them. Its only relationship is with the electrical subcontractor and, it is interesting to note that even there, there is no *local* bargaining between the I.B.E.W. and individual contractors. Since 1978, the *Labour Relations Act* has required province-wide bargaining by trade, with designated employer associations. One purpose of this legislative change was to reduce the collective bargaining problems arising from fragmented bargaining structures originally founded on separate craft bargaining units granted pursuant to section 6(3). In any event, much of the so-called maintenance activity in manufacturing is clearly an off-shoot of construction industry bargaining.

48. The final bargaining relationship put before the Board was with Ontario Hydro and a small number of contractors in the electrical power systems sector of the construction industry. About half of the union’s members involved in that sector are certified electricians and about half are not. The latter group includes “ground men” and “linemen” who may not have a certificate of qualification. The employees in this sector work on generation projects or transmission lines constructing transformers, stations, switching stations, distribution stations, and installing control equipment. The operating or running maintenance is primarily done by members of the Canadian Union of Public Employees, although Mr. Mulhaul suggested that some of his members also do such maintenance. Again, the definition of maintenance was fuzzy because workers moved back and forth between construction and maintenance, all the bargaining has been in respect of construction work, and for purposes of applying the Electrical Power Systems’ agreement, all the work is treated as construction.

IV

49. Before turning to section 6(3) itself, it may be useful to briefly sketch in something

of the statutory framework of which section 6(3) is a part; for, implicit in the competing interpretations of section 6(3) urged upon us in this case, are important questions of industrial relations policy. The choice which we make may well have ramifications beyond the present parties. That is why the Board granted status to the Steelworkers.

50. We may begin by observing that the notion of an “appropriate” bargaining unit is a labour relations concept with no common law antecedents and in the general case, no precise statutory definition. What it means, quite simply, is the group of employees whom it makes “labour relations sense” to lump together for the purposes of collective bargaining, and section 6(1) of the Act leaves the Board’s discretion to fashion bargaining units largely unfettered. Yet the Board’s determination is obviously of immense practical importance, not only for the immediate parties, but for the structure and performance of the collective bargaining system as a whole. The definition of the unit affects the bargaining power of the union and the point of balance it creates with that of the employer. It influences the potential scope and effectiveness of collective bargaining for dealing with different matters, and to some extent, even the substantive issues covered in the collective agreement. And, perhaps most important, the shape of the bargaining unit can profoundly influence the potential for industrial peace or collective bargaining discord. The more disparate are the interests enclosed within the unit, the more difficult it may be for the union to effectively represent the collectivity. Insufficient attention to these special interests generates internal strife, while too much attention to minorities may make it more difficult for a union to formulate a coherent package of proposals or make necessary concessions. On the other hand, there are dangers at the other extreme, as the Board noted in *Bestview Holdings Limited*, [1983] OLRB Rep. Aug. 1250:

28. Self-determination and community of interest often favour relatively small units, but these are not the only relevant factors in bargaining unit design. The Board must also strive to create a viable structure for on-going collective bargaining and, to this end, undue fragmentation must be avoided. Consolidated bargaining offers several advantages over a fragmented structure. A proliferation of small units may result in unnecessary work stoppages. Each time one group goes on strike, other employees performing jobs that are functionally dependent upon the work normally done by strikers are brought to a halt. Even in the absence of functional integration, strikers may erect picket lines that keep other employees away from work. The likelihood of a strike occurring increases as the number of rounds of bargaining grows, and is further enhanced by competition among bargaining agents. Secondly, each of several units typically becomes a separate seniority district, enclosed by walls which impede the movement of employees between jobs. In addition, broader-based structures may lower the cost and thereby increase the availability of insurance schemes and benefit plans. A multiplicity of bargaining units also inevitably spawns jurisdictional disputes over the assignment of work and entails the cost of negotiating and applying several collective agreements. Finally, the existence of a single bargaining unit facilitates equitable treatment of employees doing similar jobs.

A patchwork quilt of bargaining units is a recipe for industrial unrest – if only because in an integrated enterprise it takes only one collective bargaining breakdown to start the whole system unravelling.

51. The point is, that the concept of the appropriate bargaining unit is an instrument of public policy, and in fashioning bargaining units under section 6(1), the Board endeavours to accommodate potentially competing collective bargaining values – including the right to self-organization and the desirability of industrial harmony. Both are objectives which the statute seeks to promote and, significantly, both parties could point to portions of the Act's Preamble, to support their respective positions on the proper approach to section 6(3).

52. The union argues that section 6(3) is a specific and mandatory exception to section 6(1). It limits the Board's discretion and is designed to protect sectional interests, which might otherwise not be given sufficient recognition under the broader discretionary provisions of section 6(1). It is a legislative endorsement of craft units which has been translated into an aspect of public policy: an injunction that craft units must be found to be "appropriate". The union also stresses the employees' right to organize themselves and freely designate their collective bargaining representative. The union points out that this right of self-organization is now an aspect of freedom of association protected by the *Canadian Charter of Rights*. In the union's submission, section 6(3) should be interpreted in this light. The union further argues that if the Board declines to certify a craft unit of electricians the chances are that these employees will never be organized at all. Previous efforts to organize on an industrial basis have failed and, in the union's submission, the aspirations of these employees should not be thwarted because their fellow employees have shown no appetite for collective bargaining. The union asserts that fears of fragmentation are entirely hypothetical and based upon an assumption that numerous other crafts would overcome the formidable hurdles of section 6(3). The union maintains that the Board should give a liberal interpretation to section 6(3) because it is only by doing so that the rights of craft employees (obviously a matter of legislative concern or there would be no section 6(3)) can be appropriately recognized.

53. The employer stresses the statutory objective of orderly collective bargaining which, it argues, requires a bargaining unit structure which will minimize industrial conflict. In the employer's submission, fragmentation of its work force would create artificial barriers inhibiting cross-trades training, promotion, flexible work practices, and the introduction of necessary technological change. With an integrated work force of employees working in co-operation with one another, it makes no sense to treat one trade as if it were a watertight compartment, or to ignore the real problems – jurisdictional disputes, picketing problems, strike-induced layoffs, etc. – which would inevitably follow the creation of an island of collective bargaining in a sea of employees with overlapping or functionally related skills. The employer asserts that craft unions and units are obsolete in a modern industrial society, and "as proof of the pudding" points to the evidence in this case which was replete with examples of common bargaining with other skilled and unskilled employees, and diluted craft bargaining units. In the employer's submission, section 6(3) is a historical anomaly and an exception to section 6(1) which should be strictly construed. The employer argues that harmonious employer – employee relations demand it. In the employer's submission, the Board should not establish a unit which is inappropriate for collective bargaining if a plausible interpretation of section 6(3) will avoid that result, nor should it lightly extend balkanized bargaining structures beyond those industries in which they have historically existed.

V

54. Section 6(3) is an exception to section 6(1) and does have deep historical roots. Its origins can be traced to federal wartime collective bargaining regulations which, in turn, borrowed heavily from American experience in the 1930's. In both cases, the legal framework

sought to accommodate the diverse interests of a labour movement which, at the time, was deeply divided. Traditional craft unions found themselves in fierce competition with aggressive new industrial unions bent on organizing workers in the mass production industries. These new unions rejected the notion of craft exclusivity and sought to organize employees on a broader industrial basis, regardless of whether they were skilled or unskilled.

55. By the late 1930's, craft and industrial unions had split into rival federations, each espousing its own preferred model of organization. When the process of organizing became the subject of state regulation, craft unions demanded recognition of their historical role and legal protection for the special interests which they feared would be submerged without it. Craft employees were primarily interested in the preservation and advancement of their craft. In their view, this could only be achieved by bargaining separately, rather than as a minority in a much larger bargaining unit comprising both skilled and unskilled employees. The result of their lobbying was the predecessor of section 6(3) (see generally: J. A. Willes, *The Craft Bargaining Unit: Ontario and U.S. Labour Board Experience*, Industrial Relations Centre, Queen's University, 1970).

56. Legislative protection for craft bargaining units was initially based upon the bargaining structures and rivalries of the 1930's and 1940's and after the war similar provisions crept into provincial legislation. However, requirements such as section 6(3) are now relatively uncommon. Because of problems associated with the proliferation of bargaining units in industrial enterprises, federal policy has now shifted away from craft units. In fact, the trend is in the opposite direction. It has been recognized that in a modern industrial context craft units will generally be inappropriate. Following the recommendations of the Woods Task Force in 1968, federal legislation was amended to delete the provisions protecting craft bargaining units, and the circumstances in which an existing unit will be splintered are now closely confined (see *Feed-Wright Ltd.*, [1979] 1 Can. L.R.B.R. 296; *Atomic Energy of Canada Ltd.*, [1978] 1 Can. L.R.B.R. 92; and *Cablevision Nationale Ltee*, [1979] 3 Can. L.R.B.R. 267 and cases referred to therein). In British Columbia craft units will be certified only if they are "otherwise appropriate" for collective bargaining, and the British Columbia Labour Relations Board has shown a marked disinclination to endorse craft bargaining units in manufacturing. As we have already noted, while this case was being litigated the British Columbia Labour Relations Board was considering whether to merge an I.B.E.W. bargaining unit at MacMillan-Blodell into an existing industrial bargaining unit, thereby eliminating alleged industrial relations instability. Thus, while section 6(3) has deep historical roots, it is now something of an historical anomaly.

57. Nor are the protections offered by section 6(3) absolute. An examination of the statutory language indicates that it has been carefully drafted to preserve the status quo. It is a recognition of historical organizing patterns, rather than any general endorsement of craft bargaining units. Those historical criteria are built right into the section itself, and must be satisfied before it has any application. Section 6(3) is available only *if* the group of employees whom the union seeks to represent *already commonly* bargain separately and apart from other employees; and only *if* the applicant trade union has traditionally represented employees with those skills. Both conditions require the Board to look to the collective bargaining system for historical precedent to establish that the separate bargaining is already "common", and that the union's representation of these employees is in accordance with "established practice". These conditions effectively preclude the development of new craft unions and, in our view, limit the extension of craft bargaining patterns beyond their traditional boundaries. It is also

interesting to note that even if these criteria are met, the section need not be applied where the union seeks to “carve out” a craft group from an existing bargaining unit. This latter qualification is legislative recognition of the bargaining problems which might result from multiplying the number of bargaining units in an industrial enterprise; and whether fragmentation arises because the system grows in a piecemeal fashion or is subsequently carved up, the industrial relations problems are the same.

58. The acceptance of a “liberal” interpretation of section 6(3), as advocated by the applicant, could well have significant industrial relations consequences both for this respondent and generally throughout the system where craft unions could mount similar claims. If the evidence in this case establishes that separate craft bargaining is “common” even though the I.B.E.W. has a presence in only one Canadian mine, it would also be entitled to craft units in any other manufacturing or service industry. So might a number of other craft unions for, as we have seen from the evidence in this case, where the I.B.E.W. has a presence, other craft unions are also commonly present. This is not to say, of course, that the consequences of a particular interpretation of the statute can be permitted to confute its clear meaning; however, in construing the terms of the Act, the Board must necessarily be cognizant of the practical consequences of the alternative interpretations urged upon it, as well as the competing collective bargaining interests which must be accommodated. The words of the statute are not infinitely elastic, but neither is the right of self-organization absolute.

59. Issues such as those arising in the present case have been relatively uncommon in recent years, however, there are at least two earlier Board decisions which are worthy of brief mention. In *Firestone Tire & Rubber Company of Canada Limited et al.* 65 CLLC ¶16,058, a trade union sought to carve out a group of maintenance electricians from an industrial bargaining unit represented by the Rubber Workers’ Union, and encompassing all of the company’s employees in Hamilton, Ontario. In order to be successful, it had to first establish that it met the initial criteria now found in section 6(3) of the Act. The Board had this to say about the second test:

The second condition presents the applicant with greater difficulty. Electricians in the construction industry have almost invariably been recognized by the Board as constituting a craft group where certification on their behalf has been sought by recognized electricians’ craft unions such for example as the International Brotherhood of Electrical Workers or its locals. In the ship building and paper making industries, a number of employers have voluntarily recognized craft unions, including the International Brotherhood of Electrical Workers or its locals, as the bargaining agents for craft units. The first of these industries has many of the characteristics of the construction industry and in many establishments in the paper making industry there is a long history of bargaining on craft lines. However, in manufacturing in general, it is the rare exception rather than the rule for the Board to determine that any classification of maintenance mechanics constitutes a craft unit, the reason being that the several craft unions that have applied for certification for such units have rarely succeeded in showing that according to established trade union practice they commonly bargain for the respective classifications in the maintenance department separately and apart from other employees. On the basis of

the principles that the Board has applied in the past in cases of this nature, and having regard to the evidence adduced in this case, we find that the applicant failed to show that any union pertaining to the craft of electricians commonly bargains for maintenance electricians in circumstances such as those disclosed in this application.

A similar result was reached in *Dupont of Canada, Limited, Kingston Works*, [1965] OLRB Rep. Jan. 539, where the I.B.E.W. was one of five craft unions seeking to sever its particular craft grouping from an employer's maintenance department which was included in a broader industrial bargaining unit represented by an industrial union. Once again, the craft unions each had to first establish that they commonly bargained separately and apart from the group of employees in question, and once again they failed. The Board commented:

The applicant union claims to represent the employees in question because of their trade classifications and relies on the foregoing exhibits to substantiate its claim that these employees commonly bargain separately and apart from other employees through a trade union, that according to established trade union practice pertains to their skills and trade. A perusal of the collective agreements filed, however, shows that in each case bargaining in fact took place on a joint basis for employees in a composite rather than a separate bargaining unit. Also, on the evidence, we are led to conclude that the same situation prevailed with respect to at least most of the collective agreements enumerated in the two lists, Exhibits 1 and 7.

While, in the experience of this Board, of which, of course, we are constrained to take cognizance, a history of bargaining on craft lines in many establishments in the paper-making and shipbuilding industries has in previous cases been demonstrated (see e.g. *The Firestone Tire & Rubber Company of Canada Limited*, O.L.R.B. Monthly Report, February, 1963, p. 491), the Board's experience in past cases has indicated that, it is only in a few very rare exceptions that any bargaining on this basis has ever occurred with respect to classifications of trade or skilled personnel employed in any maintenance departments of commercial, industrial or manufacturing firms. Unions that have made such unsuccessful applications for certification for trades employed in maintenance departments, have in the past failed to show that according to established trade union practice they commonly bargain for such persons separately and apart from other employees.

The evidence before us indicates instances where bargaining has occurred by unions on a joint basis for maintenance employees in composite units and a number of instances where, although on the material before us the matter is left extremely vague, if not uncertain, bargaining, however it came about, has occurred between some employers and some individual unions for maintenance employees of particular trade classifications.

In our opinion, the evidence adduced on behalf of the applicant falls far short of proving that employees in maintenance departments of manufacturing firms such as the respondent or in manufacturing commercial or industrial firms in general, *commonly* (as distinguished from what is more probably a few scattered and isolated instances of bargaining in maintenance divisions of some particular employers in certain industries) *bargain separately and apart from other employees.*

• • • •

As has often been the case in applications of this nature, counsel has relied heavily in his argument on the trade classifications and work done by the employees in question, together with the fact, as he argues, that they have clearly indicated their democratic wishes, by signing cards, to be separately represented by the applicant as their collective bargaining agent. As has been pointed out by the Board in previous cases, (see e.g. *The Canadian Foundries & Forgings Limited Case* (1961) C.C.H. Canadian Labour Law Reporter, ¶16,203, C.L.S. 76-753, and *The Cooper & Beatty Limited Case*, (1957) C.C.H. Canadian Labour Law Reporter, Transfer Binder 1955-59, ¶16,100, C.L.S. 76-581), these are not the only considerations for the application of the first part of section 6(2) [now 6(3)]; if they were, every industrial or commercial undertaking and part thereof in which tradesmen were employed would, contrary to the intent and purpose of the section, be vulnerable to indiscriminate fragmentization into separate bargaining units.

The principles and requirements of proof of a bargaining history enunciated and applied from time to time by this Board in dealing with cases affected by the section are to be found in the following, among other cases, *The Cooper & Beatty Limited Case*, *ibid*; *The Firestone Tire & Rubber Company of Canada Limited Case*, *ibid*; *The Telfer Paper Box Case*; *ibid*; *Art Wire & Iron Company Case*, (1954) C.C.H. Canadian Labour Law Reporter, Transfer Binder 1949-54, ¶17,080, C.L.S. 76-437; *Brockville General Hospital*, (1957) C.C.H. *ibid*, ¶16,061, C.L.S. 76-543; *St. Mary's General Hospital (Kitchener)*, O.L.R.B. Monthly Report, February, 1963, p. 496; *Kent Tile & Marble Co. Case*, (1961) C.C.H. Canadian Labour Law Reporter, ¶16,204, C.L.S. 76-756; *Canadian Foundries & Forgings Limited Case*, *ibid*, etc.). On the basis of the principles which this Board has applied in the past in cases of this nature, we are compelled to find on the evidence placed before us that the applicant has failed to bring itself within the provisions of the first part of section 6(2) [now 6(3)] of the Act.

While these were both "carve out" cases, that question was irrelevant because the unions failed to meet the preliminary criteria.

60. This is not to say that all craft claims in manufacturing industries have been rejected. Many of the traditional crafts did in fact have a history of separate bargaining in a number of industrial settings and were, therefore, entitled to separate craft bargaining units.

Among these in particular cases were: stationary engineers, pattern makers, draftsmen, lithographers, printing pressmen, die cutters, and molders. What these cases indicate is not that the criteria of section 6(3) are impossible to meet, but that the applicant union must clearly show that it meets them – including showing, *inter alia*, that it has a well-established or common practice of separate bargaining. Moreover, in assessing whether a union has met this requirement, the Board has not been disposed to give much weight to a union's established bargaining practices in the construction industry – a setting which has its own peculiar industrial relations and collective bargaining characteristics. What may commonly happen in the construction industry is definitely not common in any other context – hence the need for special statutory provisions to deal with the unique problems and environment of the construction industry. If anything, the Board's experience in dealing with problems in the construction industry provides ample reason why those bargaining patterns should not be lightly imported into other sectors.

VI

61. As a matter of syntax, section 6(3) begins with a reference to the “group of employees” whom the union seeks to represent – here a group of electricians employed in the respondent's mining operations in Timmins, Ontario. This is the reference group to which the rest of the section relates, and it might be said that the practice of separate bargaining which the union must establish is in the respondent's enterprise, or in Ontario, or even in Timmins. However, in our view, such interpretation would be an unduly restrictive reading of the terms of section 6(3), which the Board has not adopted heretofore, and which is not justified in light of the section's purpose and historical roots. However, *assuming* the union's position that the subject group of employees can be described generically, and are, “electricians”, the union must still put before the Board a coherent body of collective bargaining experience to demonstrate that it *commonly* bargains on behalf of such employees, separately and apart from other employees. In our view, the I.B.E.W. has not done so in this case.

62. In ordinary parlance, “common” means prevalent, widespread, general, well-established, regular, ordinary, or routine, – as opposed to sporadic, irregular, infrequent, or uncommon. However the word only takes its meaning against some established background with which the particular situation can be compared. Snowstorms are “common” in Canada, but are “uncommon” in summer. What makes snow uncommon in the latter case is that when one establishes the context – summer, or previous summers – a snowstorm stands out as unusual. It is a question of relative frequency which can only be determined against some established norm. Likewise, to determine the intended meaning of “common” in section 6(3) (i.e., to assess how common a union's bargaining practice actually is) one must necessarily delimit a field of bargaining behaviour against which the situation of the employees in question can be tested. To do that, it is helpful to refer to the purpose of section 6(3), for as we have noted, section 6(3) was intended to preserve rather than extend craft representation rights. It was meant to protect craft rights where they were already commonly established. At the very least, this requires the union to show that it commonly bargains for electricians like these separately and apart from other employees in the industry in which the certification application is made, or related industries; or, alternatively, that it commonly bargains separately and apart for electricians like these in the collective bargaining system as a whole, even if not in the particular industry in question. These are the reference points which appear to us to be most consistent with the thrust and terms of the section.

63. The applicant here meets neither test, nor indeed most of the other possible alternative constructions of the common bargaining requirement. It does not *commonly* bargain separately for maintenance electricians in bargaining units in mining or manufacturing. By and large there are no electricians' craft units in the context. Where organized, most maintenance electricians fall within industrial bargaining units – in the mining industry usually represented by the United Steelworkers of America, in the auto industries by the United Autoworkers, in the rubber industry by the Rubber Workers' union, and so on. Of the 170 operating mines in Canada, the I.B.E.W. can point to only one – Hudson's Bay mining and smelting – where it has an established presence. Even there, it bargains together with a number of other trade unions, and the bargaining unit it represents is not a pure unit of electricians for whom the I.B.E.W. bargains by themselves, but a mixed group of electricians and others. We do not know how many mines there are in the United States, but there must certainly be many more than in Canada. Yet the union was able to find only a half a dozen instances where the I.B.E.W. had a foothold and, again, a number of the agreements suggest both common bargaining with other trades and bargaining on behalf of both electricians and other employees (i.e., *not electricians* separately and apart).

64. The strongest I.B.E.W. foothold is in the pulp and paper industry, but even there, there are numerous mills with no I.B.E.W. presence, and the units upon whose behalf the I.B.E.W. bargains (in co-ordinated bargaining structures) frequently include individuals who are not members of the craft. The General Presidents' maintenance agreement is not a clear example of separate bargaining either, but rather a single, multi-trade agreement, applied to work which, on the surface at least, looks very much like construction work. There is no individual bargaining by the I.B.E.W. and no distinctive or autonomous I.B.E.W. bargaining unit. Nor in the case of the General Presidents' agreement, or the ICI agreement binding electrical subcontractors, is there any direct bargaining at all with the industrial employers who may engage the services of these subcontractors.

65. Of the dozens of newspapers in Ontario with dozens of trade union relationships – many of them with craft unions – the I.B.E.W. has a presence in only one. Of the numerous universities and community colleges in this province – let alone in Canada or the United States – the I.B.E.W. can find but one agreement. Of the dozens of county and municipal school boards in this province – let alone in Canada or the United States – the I.B.E.W. can point to but two collective agreements. And there is no evidence at all that the applicant union has a presence (i.e., *commonly* bargains separately and apart) in industries or enterprises concerned with: food processing (feed mills, dairy products, cereal manufacturers, food processing, canning, slaughter houses, sugar refineries, bakeries, vegetable oil mills, breweries, distilleries, soft drinks), rubber products, leather goods, textiles (both mills and manufacturing), electrical equipment, printing and publishing, iron and steel, smelting and refining, fabricated metals (ornamental metal, wire products, metal stamping, or hardware), agricultural implements, automobiles, aircraft, commercial refrigeration and heating systems, synthetic materials, pharmaceuticals, scientific or precision equipment, and so on. The problem is to delimit the field against which the "commonness" of the union's bargaining practice may be tested. But if mining is too narrow a field, and the system as a whole is too wide, what sensible subdivision would include the pulp and paper industry but exclude so many others?

66. One need not multiply the examples or run through the entire list of industries in which there is collective bargaining to demonstrate that outside the construction and related industries the I.B.E.W. presence is minimal. Nor need one do a survey of the some 8,500

agreements in Ontario binding over a million workers or the approximately 20,000 agreements across Canada. The fact is, that even if we *assume* that the group of employees whom the union seeks to represent in this case can be described as the craft of "electricians" or "maintenance electricians", the union simply does not *commonly* bargain for such group separately and apart from other employees. Where electricians are employed in industry as part of a larger employee group, they are not typically segregated in their own bargaining units or represented by the I.B.E.W. On the contrary, apart from its established base in the construction industry and perhaps the pulp and paper industry (though even here the evidence is equivocal), the union does not have an established presence or consistent craft bargaining practice. Such bargaining as the evidence discloses is isolated, sporadic, unrepresentative, and decidedly *uncommon*.

67. For the foregoing reasons, we are not satisfied that the union has met the second test prescribed by section 6(3) and, for this reason alone, is not entitled to a separate craft bargaining unit. The matter is referred to the Register for re-listing of hearing.

2868-83-U Thomas Lenathen, Applicant, v. Jack McFadyen President Toronto Teachers Federation, Respondent

Practice and Procedure – Strike – Application under *School Boards and Teachers Collective Negotiations Act* that teachers' refusal to participate in extracurricular activities constituting unlawful strike – Person resident in school board jurisdiction having status to file – Whether respondent properly named – Inadequate particulars no reason to dismiss considering adjournment on consent

BEFORE: Richard M. Brown, Vice-Chairman and Board Members J. Wilson and C. A. Ballentine.

APPEARANCES: *Thomas Lenathen on his own behalf; J. Sack, Q.C. and Stephen Barrett for the respondent.*

DECISION OF THE BOARD; March 20, 1984

1. This application for a declaration of an unlawful strike was brought by Thomas Lenathen under the *School Boards and Teachers Collective Negotiations Act*. The respondent, Jack McFadyen, is president of the Toronto Teachers Federation. Mr. Lenathen alleged a refusal by teachers to participate in extracurricular activities was in progress and constituted an illegal strike.

2. Counsel for the respondent raised several preliminary objections: the notice of hearing was alleged to be inadequate; an adjournment was requested because Mr. McFadyen and many teachers were on holiday; counsel's request for particulars went unanswered; Mr. Lenathen's standing to bring this application was challenged; and the application was said not to disclose a cause of action. Counsel also advised the Board that the teachers involved in the underlying dispute were scheduled to meet on March 22 to consider a proposal made by their

employer. As the applicant consented to an adjournment, the Board reserved its ruling on the preliminary objections.

3. The relevant sections of the Act are set out below:

65. (1) The Federation shall not and no affiliate or branch affiliate shall call or authorize or threaten to call or authorize an unlawful strike.

(2) No officer, official or agent of the Federation, an affiliate or branch affiliate or member of a branch affiliate shall counsel, procure, support or encourage an unlawful strike or threaten an unlawful strike.

67. (1) Where the Federation, an affiliate or a branch affiliate calls or authorizes a strike or teachers take part in a strike against a board that the board, a member association, the Council or any person normally resident within the jurisdiction of the board alleges is unlawful, the board, member association, Council or person may apply to the Ontario Labour Relations Board for a declaration that the strike is unlawful, and the Board may make the declaration.

(3) Where the Ontario Labour Relations Board makes a declaration under subsection (1) or (2), the Board in its discretion may, in addition, direct what action, if any, a person, teacher, branch affiliate, affiliate, the Federation, a board, member association or the Council and their officers, officials or agents shall do or refrain from doing with respect to the unlawful strike or unlawful lock-out.

77. (1) Every person who contravenes any provisions of this Act is guilty of an offence and on conviction is liable to a fine of not more than \$500 for each day upon which the contravention occurs or continues.

(2) The Council and every member association and every board and the Federation and every affiliate and every branch affiliate that contravenes any provision of this Act is guilty of an offence and on conviction is liable to a fine of not more than \$10,000 for each day upon which such contravention occurs or continues.

(6) No prosecution for an offence under this Act shall be instituted except with the consent of the Ontario Labour Relations Board which may only be granted after affording an opportunity to the person or body seeking the consent and the person or body sought to be prosecuted to be heard.

79. Any act or thing done or omitted by an officer, official or agent of the Federation, an affiliate, a branch affiliate, the Council, a member association or a board or by a member of a board within the apparent scope of his authority to act on behalf of the Federation, affiliate, branch affiliate, Council, member association or board shall be deemed to be an

act or thing done or omitted by the Federation affiliate, branch affiliate, council member, association or board, as the case may be.

4. This Board lacks any jurisdiction to enforce section 65. The only remedy for a breach of that section is a prosecution under section 77(1) or (2). However, a criminal action cannot be initiated until this Board has given its consent pursuant to section 77(6). As the applicant did not request our consent to a prosecution, no more need be said about section 65.

5. Counsel for Mr. McFadyen contended the only individuals who would be named as respondents to an application under section 67 were officers of the Federation, an affiliate, or a branch affiliate (as these bodies are defined in section 1(1)) and teachers. Mr. McFadyen is not an officer or official of any of the named bodies. (The Toronto Teachers' Federation is an association of members of several branch affiliates and is not recognized by the Act.) Although a teacher by profession, Mr. McFadyen is currently on a full-time leave of absence and is not engaged in any teaching duties.

6. Section 67 can only be violated either by the Federation, an affiliate or a branch affiliate or by teachers. But this premise does not lead to the conclusion that Mr. McFadyen cannot be a respondent. Entities like the Federation, an affiliate or a branch affiliate can only act through people. In the legal world, bodies such as these are commonly held responsible for the actions of their officers and officials. Section 79 of the Act renders these bodies vicariously liable for the conduct of not only their officers and officials but also "agents" – so long as they act within the apparent scope their authority. Section 67(3) allows the Board to issue a remedial order to any "person". In other words, the conduct of an individual who is an agent may give rise to a violation of section 67(1) and the Board can issue a remedy against such a person. Accordingly, an agent of the Federation, an affiliate or a branch affiliate is a proper respondent to a section 67 application. We do not mean to infer that Mr. McFadyen has acted as an agent of any of these bodies, as we have not yet heard any evidence concerning his conduct. Until we know whether or not he was acting as an agent, we cannot dismiss this application for failing to disclose a cause of action.

7. However, so long as Mr. McFadyen is the only respondent named by the applicant, the Board may be reluctant to issue remedial orders against others not named as respondents – including the Federation, an affiliate, a branch affiliate and their officers and officials.

8. In our view, Mr. Lenathen has standing to bring an application before this Board under section 67(1) of the Act. He is a "person normally resident within the jurisdiction of the board." Counsel for the respondent contended that Mr. Lenathen lacked standing because his son was not enrolled in any extracurricular activities. This contention finds no support in the language of section 67(1).

9. Counsel for the respondent urged us to dismiss this application because it is devoid of particularity. Although Mr. McFadyen is named as the respondent, the application does not allege any particular misconduct on his part. The application refers to a refusal by teachers to engage in extracurricular activities, but neither provides details as to time and place nor names any teachers. In the peculiar circumstances of this case, we decline to dismiss the application for want of particularity. As counsel for the respondent requested an adjournment due to his client's absence from the province, particulars can be provided by the applicant before

the matter comes on for hearing again, without causing any delay in these proceedings. Moreover, the applicant is neither versed in the Board's process nor represented by counsel. Mr. Lenathen was advised at the hearing of his obligation to provide particulars pursuant to section 72(1) of the Rules of Procedure.

10. The matter is referred to the Registrar to be re-scheduled for hearing.
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1675-83-U Windsor Grain Processor's Union, Complainant, v. Maple Leaf Monarch Company, Respondent

Interference in Trade Unions – Unfair Labour Practice – Whether union official penalized because of support for union merger – Whether employee subjected to unusual medical procedure because of his testimony at arbitration – No anti-union animus – Notice to employee suggesting opposition to merger not containing “coercion, intimidation etc...” – Employer's refusal to deal with union president while under suspension for violent behaviour not interference

BEFORE: Richard M. Brown, Vice-Chairman, and Board Members F. W. Murray and H. Kobryn.

APPEARANCES: *John Pistor, Mike Renaud, Brian Brohman, Mike Allen, Rick Weir and Gord Sturm for the complainant; Michael Hines and Winston F. Scotland for the respondent.*

DECISION OF THE BOARD; March 2, 1984

1. The Windsor Grain Processor's Union, (the “union”) alleged Maple Leaf Monarch Company (the “employer”) violated sections 64, 66, 70 and 80 of the *Labour Relations Act*.

2. The general thrust of the union's complaint is that the employer interfered in a proposed merger between the union and the United Automobile, Aerospace and Agricultural Implement Workers (the “U.A.W.”) by penalizing some employees and attempting to sway others. Michael Renaud, president of the union at the time, was a visible supporter of the U.A.W. in September 1983. He worked as a shift leader. In the early part of September, John Laine the production manager, spoke to Renaud about the work performed on his shift. The union alleged that Laine expressed his disapproval of Renaud's work and attributed this dissatisfaction to his role as union president. According to Laine, he spoke to Renaud about the performance of those he supervised and, when Renaud asked why the matter had not been raised during the summer, Laine replied he had not wanted to trouble the union president while he was involved in negotiations to renew the collective agreement. As Michael Renaud did not testify before us, we accept Laine's account of this conversation as true. Copies of memorandums sent to Renaud, during the spring of 1983, about the poor performance of his shift were also introduced into evidence.

3. On September 26th, the employer posted a notice drafted by Winston Scotland, the Technical Director, after consultation with counsel:

TO: All Members of the Windsor Grain Processor's Union.

I understand that you and the other members of the Union are soon to decide on whether or not you should become part of, or be affiliated to, a bigger organisation. A number of you have asked me for the Company's opinion.

The Company in no way wishes to interfere or influence you in arriving at your decision. However, such a change in the status of the Union which represents you raises certain important issues which you should carefully consider:

- Who will be making the decisions in the future, on your behalf;
- Will there be any change in the level of dues or financial assessments, and if so, how much will they be?
- Will there be any new obligation?
- What control will you have over your dues?
- Will there be any change in your Constitution and By-Laws?

These and other related questions are for you to decide, but we urge you to attend the meeting and give serious consideration to this important decision.

(signed) Winston Scotland

According to Scotland, he simply wished to ensure that the decision taken by the union was supported by the majority of employees, and he was indifferent to the outcome.

4. On Friday, September 28, 1983, union members attended a meeting called by the executive to discuss the proposed merger. The proposal was supported by slightly less than two-thirds of those present. As a majority of two-thirds is required for constitutional amendments, the merger was defeated.

5. Two days later, Renaud and Larry Recoskie, a fellow employee, were involved in a physical altercation in the locker room. Recoskie reported this occurrence to his supervisor and it was discussed at the regular 10:00 a.m. management meeting. By this time, statements had been obtained from Renaud, Recoskie and Cliff Campeau - Renaud had given an oral statement to his supervisor, who had reduced it to writing, but the other two statements were written by the employees concerned. Renaud denied that anything had happened, but Recoskie claimed Renaud had pushed him against the lockers several times and then started swinging when Recoskie pushed him away. According to Campeau, he heard a great deal of noise before rounding a corner in the locker room to see Recoskie picking up his hat, pen and glasses from the floor, with Renaud nearby. Campeau's statement also said that Recoskie accused Renaud of "taking a swing" at him and that Renaud told Campeau "your're fucking next". As Campeau's statement placed A.B. Scott in the locker room at the crucial time, the employer

contacted Scott by telephone, but he denied seeing anything. Another altercation in March, 1983, also involving Michael Renaud, was mentioned by Laine at the 10:00 meeting. According to Laine, shortly after this incident, Renaud admitted shoving Paul Monpetite because he complained that employees on Renaud's shift had not cleaned up properly. Laine testified he had told Renaud the next such incident would result in serious discipline. Armed with the three statements and Laine's accounts of the earlier occurrence, Scotland consulted counsel and decided to suspend Renaud for the weekend, with pay, pending further investigation. This decision was communicated to Renaud in writing, at approximately 1:00 p.m.

6. Renaud then approached Laine who, in consultation with Scotland, agreed to set up a meeting at which Renaud could confront his accusers. Laine and Scotland met first with Recoskie and Campeau, who repeated what was contained in their written statements. According to Laine, Recoskie had a bruise on his forehead and appeared to be very upset. He said Renaud's actions were motivated by Recoskie's opposition to the U.A.W. He also said he might have hit Renaud while pushing him away. Renaud then arrived with Brohman and Weir, two union representatives. According to Scotland, the two union representatives disclaimed any responsibility for what Renaud might do if allowed in the same room as Recoskie and Campeau. In Renaud's absence, Recoskie and Campeau recounted their stories in front of Brohman and Weir – who were invited to ask questions – as well as members of management. After Renaud's accusers left, he was called in and told what they had said. He still denied anything had happened. Renaud also said he would not be responsible if anyone else left the plant as a result of his suspension. At some point, Laine was told by Renaud that Recoskie and Campeau were antagonistic towards him because of his support of the U.A.W. Campeau had been union president until displaced by Renaud in early 1983. Before the afternoon meetings on September 30th, Renaud gave Laine a written statement claiming that Ken Jackson, Paul Cainen and Gord Sturm had been in the locker room that morning. No attempt was made by management to contact Sturm because he was known to be a friend of Renaud and because Cainen told Laine that Sturm was not present. During the course of the day, Rick Taggart, the health, safety and security officer, arranged to have Recoskie photographed and examined by the company doctor. At the end of the day, the employer confirmed its earlier decision to suspend Renaud with pay, pending further investigation. According to Laine and Scotland, their objective was to prevent a reoccurrence by removing the alleged aggressor from the plant. Rick Taggart was present in the locker room at every shift change on that weekend.

7. There was another incident in the locker room on September 30th. Renaud reported that his locker had been forced open and that union monies and documents had been removed. He called the police who visited the site of the crime. Rick Taggart decided that no further investigation was warranted because he did not believe Renaud.

8. On the weekend immediately after the locker room incidents, Rick Taggart decided to implement special procedures for incoming telephone calls. Apparently, the normal practice is to summon an employee to the telephone to receive calls. But on this weekend, the security guard took the name and number of a caller and then relayed this information to the employee concerned who then returned the call. According to Taggart, the reason for this procedure was to prevent anyone from delivering threats that could not be traced.

9. On the night of Friday, September 30th, Gord Sturm advised the employer that he would not be able to work on Saturday due to illness. Recalling Renaud's comment about others leaving the plant, Laine did not believe that Sturm was sick. The production manager

issued instructions that Sturm was not be allowed to return to work until he produced a note from the company doctor, even though the employer had previously accepted notes from an employee's family doctor. Consequently, Sturm was sent home when he arrived for work on Sunday. However, the employer recanted and accepted a note from Sturm's family physician before his next working day. As employees are paid on a salary basis, Sturm received his regular wages for Saturday. But Scotland initially ordered that Sturm not be paid for Sunday. Although this order was countermanded on Monday, Sturm was not paid due to a clerical error. After a grievance was filed, he was paid and his record was amended to show an illness of only one day.

10. On October 4th, Renaud was informed that he was to be suspended from October 5th to 28th. Renaud was also told at the same time that he was being removed from the position of shift leader – at a financial loss to him of approximately thirty-five hundred dollars annually. Both Laine and Scotland noticed swelling around Renaud's eye when he visited the plant on October 4th, but neither questioned him about his appearance. His subsequent request for copies of the statements made by Recoskie and Campeau was denied. Renaud's three week suspension was the longest ever meted out by the employer, even though there had been other fights – one employee had participated in several. However, the September 30th incident was the first physical altercation since Winston Scotland was placed in charge of the plant. According to Laine, Scotland has been firmer with employees than had been his predecessors.

11. Throughout the month of September, Renaud received at his home threatening phone calls and notes relating to the merger campaign. According to Laine and Scotland, they first learned of these threats on September 30th when Renaud accused Laine of being the perpetrator. At the hearing, the union withdrew this accusation against Laine and substituted an allegation that the employer knew of the threats and took advantage of them.

12. The union also alleged that Renaud was not allowed to visit the plant to attend to union business during his suspension. On October 6th, Renaud arrived at the plant and asked to see Mike Allen, the union vice-president, who was working at the time. Scotland relayed a message that Renaud was not to be allowed on the site while suspended. Two grievances were under consideration in this time period. The Sturm grievance was resolved at an impromptu meeting on October 20th at which Renaud was not present. Renaud grieved his suspension and demotion on October 6th. Under the collective agreement, disciplinary matters are first discussed at step two in the grievance process. This grievance was the subject of a step two meeting on October 7th attended by Laine and Mike Allen. According to Laine, Allen was content to proceed in Renaud's absence. The third step meeting was scheduled for October 12th. In the past, the union has invariably been represented by its president at step three meetings. But Scotland refused to meet with Renaud for two reasons. He was under suspension and, as the grievor, his presence would inhibit compromise. Although Scotland was prepared to meet with the union's vice-president, no step three meeting took place on October 12th. The employer issued a written step three reply that day and on October 20th the parties agreed to dates for an arbitration hearing. By letter dated October 19th, Scotland stated he had changed his mind and was willing to recognize Renaud's status as a union officer during his suspension. Saying he was willing to meet the union president, Scotland noted the earliest possible date was November 1st. That was the first day that Renaud was scheduled to work after his suspension. On November 1st, Scotland and Renaud discussed his grievance.

13. During the month of November, the employer refused to pay union representatives

who were absent from work to attend arbitration or labour board proceedings. The past practice had been to pay employees who were away from work, at negotiating sessions or arbitration hearings – there had only been one previous arbitration. A memorandum announcing this change was posted in the coordinator's office where it was visible to all employees. Winston Scotland testified that he sent this memorandum to two managers, but did not direct that it be posted and did not know who put it on the notice board. According to Scotland, the denial of pay to union officials was part of a larger scheme designed to put the company in the black. The number of managers has been reduced, entertainment and travel expenses have been cut back and management salaries were frozen during 1983. In the same year, the salaries of bargaining unit employees increased by five per cent. According to Scotland, the negotiations that produced this increase were long and tough. Renaud was the chief spokesman on the union side of the bargaining table.

14. We do not find any violation of the *Labour Relations Act* in the events recounted above. Motive is a necessary ingredient of a violation of sections 66, 70 or 80. These sections prohibit an employer from taking certain action against an employee *because* that person is engaged, or will engage, in protected activity. Two of the union's allegations were that Renaud was penalized for his support of the U.A.W. and that Sturm was subjected to new medical procedures because he was a potential witness at an arbitration hearing. There can be no doubt that campaigning on behalf of a trade union and testifying before an arbitrator are protected activities. As to the application of section 80 to arbitration proceedings, see *Ontario Nurses's Association*, [1982] OLRB Rep. Oct. 1546. But we conclude, on the balance of probabilities, that the employer's treatment of Renaud and Sturm was in no way motivated by these activities. Similarly, we do not believe that any of the other steps taken by management were tainted by a desire either to punish employees for exercising their rights under the Act or to prevent them from exercising those rights.

15. Nor has the employer contravened section 64. We are inclined to read between the lines of the notice posted on September 26th a statement of opposition to the U.A.W. – the most likely answers to the questions posed would favour the incumbent union over the U.A.W. However, even interpreted in this way the notice is protected by the free speech proviso in section 64. The implied message that we have identified contains none of the elements proscribed by this section – “coercion, intimidation, threats, promises or undue influence”. We rely upon several features of the case at hand in coming to this conclusion. There is no suggestion that the favoured union is under management domination or control. As it has been the incumbent bargaining agent for several years, employees no doubt assumed, even before anything was said by management, that the employer would probably prefer to continue to deal with it in the interest of continuity, regardless of any other reason for preferring one labour organization over the other. And the expression of preference for the incumbent union was not made against the background of any management conduct that would cause employees to see anything sinister in this message.

16. The most troublesome aspect of this case is Winston Scotland's initial refusal to recognize Renaud's status as union president during his suspension. Indeed, we are not entirely satisfied that the employer's stance ever really changed, as the November 1st meeting proposed by Scotland coincided with Renaud's return to work. However, in the peculiar circumstances of this case, we conclude that the employer's refusal to deal with Renaud as union president did not amount to interference in the administration of a trade union contrary to section 64. Given that Renaud was under suspension because he was believed to have violently

attacked another employee, management had a legitimate interest in barring him from the plant to prevent a reoccurrence. In addition, on the evidence before us, the only matter Scotland expressly refused to discuss with Renaud was his own grievance. We do not view this as an attack upon the union, as grievors are often excluded from labour-management meetings in order to facilitate the settlement process.

17. This panel feels obliged to express a concern about the state of labour relations at Maple Leaf Monarch Company. By dismissing this complaint, we have indicated that the allegations made by the union cannot be sustained. The pressing of some of those charges cannot but have a negative impact on a collective bargaining relationship. However, the employer is not blameless. We are particularly troubled by Mr. Scotland's statement that he could not meet with the union president until November 1 – the first day that Renaud was back at work. Whatever the real reason for choosing this date, the employer ought to have realized the perception of Mr. Renaud and other employees would be that management was playing games.

18. The complaint is dismissed.

DECISION OF BOARD MEMBER H. KOBRYN;

1. I have reviewed all the facts covered in the decision although I put a little different interpretation on many of them. I certainly can lend support to the Chairman's statements in the last two sentences of paragraph 17. I also fully subscribe to that old opinion "where there's smoke, there's fire". This belief comes from my many years of experience in the labour relations field. This opinion gains support and credence from the evidence from the company's health, safety and security officer, Mr. Rick Taggart in the way he viewed Mr. Renaud's complaints and allegations as compared to the other involved employees. He viewed them as being jokes and totally unbelievable, in fact, he said he treated them as something between the ridiculous and sublime. This kind of intolerable attitude by a lower management individual and the way he was so vocal about same at this hearing, can only be perceived as having upper management support or in the very least this attitude by Taggart towards Renaud as president of the union was encouraged.

2. Granted, that given all the facts in this case which include the background history of the election of a new union president in Mr. Renaud and the replacement of the top management position by Mr. Scotland, then followed by a tough round of negotiations headed up by these two new players, followed by an attempt by the union to amend its constitution and by-laws so it could merge with the U.A.W. to which the employer responded with a employer posted notice, whose intent was not as innocent as Mr. Scotland tried to imply. Together all these stated facts may not add up to an violation of the *Labour Relations Act* but most definitely the employer is not blameless. Thus, my stated opinion comes fully into play.

3. Having said all of that I will add one other observation. The only way that labour management relations can return again to a meaningful and workable level in this plant, is to have the attitude of all the parties change from the present inflexible new broom mentality to one of trust and mutual respect of each other's rights and obligations.

2341-83-R United Steelworkers of America, Applicant, v. Marley Roof Tiles Limited, Respondent

Bargaining Unit – Build-Up – Employer plans to expand work-force – Board policy to treat 50% of projected workforce as representative – Union having sufficient support for certification even at point where 50% of projected numbers hired – No vote direction or postponement of certification – Employees slated to be hired and laid off in three months not considered as factor

BEFORE: Ian C. Springate, Vice-Chairman, and Board Members I. M. Stamp and H. Kobryn.

APPEARANCES: *Stephen Krashinsky, Everett Roberts and Norman Cress for the applicant; Lynn H. Harnden and Bernard M. Curtis for the respondent.*

DECISION OF THE BOARD; March 22, 1984

1. This is an application for certification.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
3. Having regard to the agreement of the parties, the Board finds that all employees of the respondent in the Town of Milton, save and except foremen, persons above the rank of foreman, office and sales staff, field installation staff and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.
4. For the purposes of clarity, the Board notes the agreement of the parties that employees in the positions of storeman, driver and roof loading crew are not part of the field installation staff and are included in the bargaining unit. The parties are also in agreement that employees in the position of scaffolder (being a person who works outside the plant erecting scaffold for the field installation staff) are part of the field installation staff and are not included in the bargaining unit.
5. On the date of the making of the application there were fifteen employees in the bargaining unit. The applicant filed evidence of membership on behalf of all fifteen employees. In these circumstances, the Board is satisfied that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on January 23, 1984, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*,

to be the time for the purpose of ascertaining membership under section 7(1) of the said Act. Accordingly, the applicant has established that it meets the statutory requirements for automatic certification.

6. Notwithstanding the fact that the applicant has met the statutory requirements for automatic certification, the Board retains a discretion under section 7(2) of the Act to direct the taking of a representation vote. The respondent submits that this is an appropriate case in which to direct such a vote, and further that the vote should be postponed until some six months after the application date. The respondent bases its case on a projected build-up in the number of employees in the bargaining unit.

7. The respondent led evidence before the Board that establishes that it has set in motion a firm plan that can reasonably be expected to lead to an increase in the number of employees between the application date of January 12, 1984 and August of 1984. The respondent's estimates indicate that the number of employees in the bargaining unit will be as follows for the months of January to July, 1984:

January	- 15 employees
February	- 16 employees
March	- 22 employees
April	- 28 employees
May	- 32 employees
June	- 35 employees
July	- 36 employees

The respondent projects a total of fifty-four bargaining unit employees in August of 1984. However, most of this increase is projected to relate to a temporary second shift of approximately fifteen employees, with these additional employees being laid-off in November of 1984. Indications are that only three employees who will be hired during August are likely to be retained past November of 1984.

8. In cases involving a projected build-up in employees, the Board seeks to balance the right of persons presently employed to collective bargaining against the right of future employees to select a bargaining agent of their own choice. As the Board noted in the *Canadian Cannery Limited* case 57 CLLC ¶18,056 a refusal to certify immediately tends to deprive the current employees of their right to collective bargaining, including the right to engage in legal strike activity. However, immediate certification will prevent future employees from having input into selecting a bargaining agent (or deciding not to be represented at all) for some period of time due to the provisions in the Act relating to the displacement and termination of bargaining rights.

9. The Board surveyed the criteria it has applied in trying to balance the interests of the two groups in *F. Lepper & Son Ltd.* [1977] OLRB Rep. Dec. 846 at pp. 847-848:

"Over the years the Board has developed some guideposts to assist it in the balancing of the rights of these two groups of employees. Firstly, the Board requires that there be a real likelihood that a build-up will take place; there must be a firm plan for an imminent build-up. (See *Power Controls* [1967] OLRB Rep. Mar. 954, *Cameron Packing Inc.* [1972]

OLRB Rep. Nov. 988, and *Canron* [1967] OLRB Rep. Sept. 750.) As well, the actualization of the build-up must be relatively certain. It should not, in other words, be dependent on market factors well beyond the control of the employer. In *Travelaire Trailer Mfg. Ltd.*, [1970] OLRB Rep. Nov. 829, for example, the Board ruled that the planned build-up was not sufficiently firm to delay the vote because the build-up was almost totally dependent on the unstable market conditions in which the respondent's industry was engaged. The Board made a similar ruling in *Cameron Packaging Inc.* (*supra*), where the projected build-up was dependent on the next year's market and competitive conditions. *Secondly*, the planned build-up must take place within a reasonable period of time. While each case must be decided on its own facts, we note that in *Vulcan Equipment*, [1974] OLRB Rep. May 285, a build-up over a period of seven months was allowed; in *United Asbestos*, [1974] OLRB Rep. April 234, a build-up over a period of some sixteen months was allowed. In *Wix Corporation Limited*, [1975] OLRB Rep. Aug. 637, on the other hand, a build-up spanning between one and five years was not allowed. *Thirdly*, to determine whether the existing group is sufficiently representative of the expected total, the Board looks to whether the employees employed at the time of the application constitute more than fifty per cent of the anticipated number of employees. If less than fifty per cent of the expected total are then employed it is normally felt that the group is not sufficiently representative and that the application is therefore premature. (See *B. F. Goodrich Canada Limited*, [1970] OLRB Rep. Sept. 655; *Cornwall Spinners*, [1975] OLRB Rep. Sept. 693.) *Fourthly*, as another yardstick in determining the representative character of the existing work force, the Board looks to the proportion of projected classifications that are filled at the date of the application. (See *Ford Motor Co.*, [1967] OLRB Rep. Dec. 858, *Cornwall Spinners*, (*supra*) and *Sparton Tool & Mould Ltd.*, [1975] OLRB Rep. June 469.)"

10. In applying the criteria referred to above, the Board generally does not take into account normal fluctuations in a company's work force arising out of the cyclical nature of the particular business in which it is engaged. In this regard see *Filkon Food Services Limited* [1981] OLRB Rep. May 1771, where in rejecting the argument that a projected influx of summer students into a bargaining unit involved a build-up such that the Board should delay consideration of a certification application, the Board made the following comments:

"...the Board's sole concern is whether the employee complement at the time of an application for certification is 'representative' of the full complement on an ongoing basis (see, e.g. *Atlantic Packaging*, [1980] OLRB Rep. Feb. 158, paragraphs 8 and 9). What the respondent is relying upon in this case is a purely seasonal fluctuation in its work force, involving the increased use of students in the summer. The Board has never held that an application for certification which includes summer students must be brought in the summer. More importantly, the Board has consistently refused to take into account seasonal fluctuations in a work force, from the point of view of either 'build-up' or bargaining-unit configuration, outside of certain historically-recognized industries such as canning and

tobacco-harvesting (see *Universal Cooler*, [1967] OLRB Rep. Sept. 546; *Melnor Manufacturing Ltd.*, [1976] OLRB Rep. May 215). The Board in most instances, in other words, does not take into account the normal ebb and flow of the work force. That is all that is occurring in the present case, albeit for the first time because this is the first year the respondent will be operating on a 'seasonal' basis.'

11. We turn now to the facts at hand. As already indicated, we are satisfied that the respondent has set in motion a plan that can reasonably be expected to lead to an increase in the number of bargaining unit employees. The period of time involved is within the time frame accepted by the Board in certain other cases. Further, it appears that employees are already employed in most of the projected classifications. Accordingly, in applying the Board's criteria as set out in the cases referred to above, the only remaining question concerns the representative nature of the existing group of employees.

12. In approaching this question, we do not believe that we need be unduly concerned about the wishes of those individuals who are slated to be hired in August and laid off again in November. The planned hiring of these individuals appears to involve the type of seasonal fluctuation which the Board has traditionally not viewed as involving a build-up. Further, in the balancing of competing interests, we are satisfied that the interests of the current employees clearly override the interests of individuals who will not be hired for some months yet, and who are slated to be laid off approximately three months after they are hired.

13. When the fifteen temporary employees projected to be hired in August are excluded from consideration, there still remains a projected build-up to thirty-nine employees. As indicated in the above excerpt from the *F. Lepper & Son Ltd.* case, the Board generally takes the position that a group of employees is sufficiently representative if it includes fifty per cent of the expected total number of employees. In the instant case, the fifty per cent point is projected to be reached at some point during the month of March, 1984 when the respondent hires the twentieth bargaining unit employee. Accordingly, if the Board were to follow its normal practice, it would consider the wishes of a majority of employees at that point in March when twenty employees were employed in the bargaining unit. Generally, this would be done by way of a representation vote. Given the facts of this case, however, we are satisfied that no such vote is required. Presumably, of the twenty bargaining unit employees projected to be employed in March, fifteen of them will be the same employees who were in the bargaining unit on the application date. All of these fifteen employees are members of the applicant. Accordingly, even when half the total projected number of the employees are employed in the bargaining unit, it appears reasonable to conclude that over fifty-five per cent of them will be members of the applicant union. In these circumstances, we believe the current employees to be sufficiently representative for the purposes of this application. Accordingly, we are not prepared to direct the taking of a representation vote or to postpone certification of the applicant.

14. A certificate will issue to the applicant.

2150-83-R Ontario Public Service Employees Union, Applicant, v. **Board of Governors of Ryerson Polytechnical Institute**, Respondent, v. Group of Employees, Objectors

Certification – Petition – Practice and Procedure – Objectors claiming inadequate posting and opportunity to solicit support for petition – Seeking representation vote despite union support in excess of 55% – Absence of some employees from work unavoidable – Objectors not entitled to contact every employee at workplace – Extension of terminal date proper remedy even if posting inadequate

BEFORE: Richard M. Brown, Vice-Chairman, and Board Members F. W. Murray and W. F. Rutherford.

***APPEARANCES:** Chris G. Paliare and Barbara Linds for the applicant; Michael Gordon and John Rolian for the respondent; Michael G. Horan and Penny Lee for the objectors.*

DECISION OF RICHARD M. BROWN, VICE-CHAIRMAN, AND BOARD MEMBER W. F. RUTHERFORD; March 13, 1984

1. The objectors have challenged the adequacy of the notice of this application given to employees. The objection is that some employees were absent from work at the time notices were posted on the employers premises, and the remedy requested is a representation vote pursuant to section 7(2) of the Act. Those raising this objection are not employees who were away from work, but those who circulated a petition in the work place. The crux of their complaint is that they were precluded from obtaining signatures from a sufficient number of employees to prevent the applicant from obtaining certification without a vote.

2. In the absence of this objection, we would have certified the applicant under section 7(3), without directing a representation election, in accordance with the Board's normal practice. The applicant has filed documentary evidence which establishes that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made were members of the applicant on December 23, 1983. That is the terminal date fixed for this application and the date which the Board established, pursuant to section 103(2) of the Act, to be the time for determining membership under section 7(1) of the Act. The terminal date is also the last day upon which the Board normally will accept a petition. Before that date, the objectors filed a petition expressing opposition to the union. Although some employees who signed the petition are union members, more than fifty-five per cent of the employees concerned are union members and are not signatories to the petition. For that reason, all parties are agreed that the petition, standing alone, is irrelevant to the outcome of these proceedings. Consequently, but for the objection to the posting, a certificate would have issued to the applicant. The objector's contended the alleged inadequacy of the posting impeded their efforts to obtain a sufficient number of signatures from union members, before the terminal date, so as to reduce below fifty-five per cent the number of union members who were not signatories to the petition. The significance of their argument is that the Board normally holds a vote when this number drops under fifty-five per cent-provided that the petition is proven to be a voluntary expression of the wishes of those who signed it.

3. Employees are notified of an application for certification by the posting of Form 6,

entitled "Notice to Employees of Application for Certification and of Hearing". This notice advises employees that a named trade union has applied for certification and describes the proposed bargaining unit. Employees are also advised that anyone wishing to make representations in opposition to the application must do so on or before a specified terminal date.

4. There is no dispute as to the facts in the case at hand. The application was filed on December 13th and fifty-seven copies of Form 6 were posted on the employer's premises between 10:00 and 12:00 a.m. on Friday, December 16th. The terminal date was exactly seven days later, Friday, December 23rd. The employer's records show that the number of employees in the bargaining unit who were absent from work on any given day between December 16th and December 23rd ranged from twenty-eight to sixty-eight. Twenty eight employees – or 5% of those in the bargaining unit – were recorded as absent from December 16th to 23rd inclusive. A total of forty-five employees – or 9% of those in the unit – were absent throughout the entire work week of December 19th to 23rd. In addition to these recorded absences, there were "informal abstentions" from work. An "eyeball" survey by one of the objectors found that approximately one half of the employees in academic areas of the institution were absent at various times between December 19th and 23rd – this estimation includes recorded absences. Some of those whose absences were unrecorded were away for part of a day only and some for a whole day, but none were absent for the entire week of December 19th to 23rd. The challenge to the adequacy of the posting was raised by counsel for the objectors in a letter presented to the Board and to the other parties on January 6th. As the remedy requested was a vote, the Board deferred consideration of this objection until we could ascertain whether or not a vote was required in any event.

5. Counsel for the objectors began his argument by observing that the Act grants employees freedom of choice with respect to union representation. He contended that the right to support a trade union found in section 3, also entails the right to oppose collective bargaining. Turning to the facts at hand, counsel emphasized the narrow margin by which the membership evidence filed by the applicant surpassed the fifty-five per cent bench mark, and he noted the number of employees who were absent from work. He asked us to find the objectors had been denied an adequate opportunity to solicit support for their petition. Having asserted that the normal remedy for an inadequate posting was an extension of the terminal date, counsel for the objectors asked us to order a representation vote to safeguard the petitioners' rights under section 3. Counsel for the employer also contended that the democratic principle enshrined in the statute calls out for a representation election. Counsel for the union observed the number of employees who were away from work at the relevant time was no more than would be absent from many work places during July and August when many people take their annual vacation. Without conceding that the posting was inadequate, he argued the proper remedy for a deficient posting was an extension of the terminal date. Counsel for the union also emphasized that no employee who was absent from work has objected to the Board that he or she was not aware of the application for certification and of the right of employees to make representation to the Board before the terminal date. Indeed, there was no hard evidence that any employee who has not come before the Board has suffered prejudice.

6. We begin our response to these submissions by asking whether or not the objectors have been prejudiced. The primary reason for giving notice is to allow employees opposed to a trade to make representations to the Board. The objectors were notified and appeared before us. But they contended that proper notice ought to allow them to do more. In their

view, notification ought to afford opposing employees an opportunity to organize fellow workers who already hold the same point of view and to persuade others to turn away from trade unionism. This argument is not without force. But the objectors construe the purpose of giving notice even more broadly, contending they ought to have been allowed an opportunity to contact *all of their fellow workers on the employer's premises*. This is a novel proposition. We note employees are often denied this opportunity for reasons unrelated to the Board's posting. Some employees may take lunch and coffee breaks at a different time than others, perhaps on another shift; and not all employees affected by an application may work at the same location. We also observe there is nothing unusual in a number of employees being away from work for lengthy periods by reasons of vacation, illness, or layoff. In these circumstances, an extended posting would facilitate contact among employees, but only at the expense of delaying the disposition of an application for certification. Assessing the facts at hand against this background, we do not believe that the objectors' complaint is deserving of legal relief.

7. There is a second reason why the objection before us cannot succeed – the relief requested is not appropriate. If notice is inadequate, the problem can be overcome by ordering a second posting with a new terminal date. This approach does not infringe upon the Board's normal practice of issuing a certificate to a trade union demonstrating that more than fifty-five per cent of the employees concerned are union members. Even assuming the posting was deficient, there is no good reason to depart from the Board's policy of granting certificates without a vote, because any inadequacy in the posting can be completely rectified in another way. Although counsel for the objectors acknowledged that an extension of the terminal date was the normal remedy, he did not request this sort of relief.

8. For these reasons, we do not accede to the objectors' request for a representation vote.

9. The issuance of certificate must await the parties agreement on the precise description of the bargaining unit.

DECISION OF BOARD MEMBER F. W. MURRAY;

1. I dissent.

2. I am simply not satisfied that the employees in the unit had adequate opportunity to see the posting of the notice of application for certification or, in any event, if they did see it to consult each fellow employee and, if they so desired, to register opposition to the application.

3. On the evidence, the Board simply could not draw any conclusions as to the number of "informal abstentions" from work, having regard for the fact that the day the notice was posted, December 16, 1983, was the last day when students could attend lectures and in effect was the end of the academic program till the new year. I would reasonably conclude that the "informal absentions" were considerable.

4. I am particular mindful of the fact that the employees in the unit are spread all over a large institutional campus and this physical environment, together with the absentee element that prevailed at this time of year, prompts me to conclude that the Board should have, on its own motion, extended the terminal date thus giving the applicant and those that might wish to object to the application the opportunity to file whatever additional evidence they might have in support of their respective positions.

2583-83-R Seafarers' International Union of Canada, Applicant, v. **Seafarers' Training Institute**, Institut De Formation Des Marins, Respondent, v. Group of Employees, Objectors

Certification – Practice and Procedure – Trade Union – Seafarers' union seeking certification for employees of Seafarers' Training Institute – Union president also chairman of employer's Board of Directors – Other union executive also officers of employer – Certification precluded by section 13 in circumstances

BEFORE: R. O. MacDowell, Vice-Chairman, and Board Members S. Cooke and W. H. Wightman.

APPEARANCES: *Andrew Boyle, Malcolm Boyle and Michael Desjardins for the applicant; no one appearing for the respondent; C. J. Abbass (as agent for Wilson & McClelland, Barristers & Solicitors), Phillip E. Caddick, Robert P. Smith, C. Martel and Barbara Sheridan for the objectors.*

DECISION OF THE BOARD; March 14, 1984

1. This is an application for certification. For ease of reference and to avoid confusion, the respondent, the Seafarers' Training Institute, will be referred to simply as the "employer". The applicant union will be referred to as "the union" or the "SIU".

2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

3. The employer is a non-profit corporation formed for the purpose of establishing and operating a school for the training of seamen. The employees who are the subject of this certification application work for the school either as instructors or support staff. The corporation itself is run by a board of directors. There are six directors in all: three from the SIU and three representatives of the Great Lakes Shipping Companies. The president of the respondent employer is Roman Gralewicz. Mr. Gralewicz is also the president of the SIU. The other two "union" representatives on the respondent employer's board of directors are Richard Thomasson, an area vice-president of the SIU, and Roger Desjardins, the secretary-treasurer of the SIU. It is Roger Desjardins whose (stamped) signature appears on the Form 9, Statutory Declaration, attesting to the regularity and sufficiency of the applicant union's membership documents. Michael Desjardins, the collector of the membership cards filed in support of this application is the son of Roger Desjardins. It is apparent, therefore, that the applicant union

and the respondent employer are inextricably intertwined. This impression was reinforced by the facts adduced before the Board at the certification hearing on February 6, 1984.

4. It is not disputed that certain employees of the School were interested in trade union representation and were "shopping around". When this came to the attention of Mr. Gralewicz, he held a meeting of the employees and suggested that they consider joining his union, the SIU. Subsequently, most of the employees did, in fact, join the SIU. We therefore have the rather unusual spectacle of the chairman of the employer's board of directors suggesting that the respondent's employees should join a trade union of which he is also president.

5. Mr. Boyle, the executive vice-president of the SIU, filed the application for certification and told the Board that he would be responsible for negotiating the collective agreement covering the employees of the School and, as well, would be responsible for dealing with any grievances or other administrative problems which might subsequently arise. Mr. Boyle reports to Mr. Gralewicz and, as a perusal of the SIU constitution indicates, is subject to the president's authority. It is a little difficult to see how he could be an independent advocate of employee interests or press a position on behalf of the employees which Mr. Gralewicz thought was inconsistent with the orderly running or success of the School. For example, is it conceivable that the SIU or its officers would support a strike against the SIU School?

6. Collective bargaining, by its very nature, requires an arm's length relationship between the "two sides" whose interests and objectives are sometimes divergent. To put the matter colloquially: the bargaining table really must have two sides and the employees' representative cannot wear two hats. The union's first interest and loyalty must be to those it represents and while this does not mean that there cannot be harmonious employer-employee relationships within a collective bargaining framework, neither should there be any doubt about the employees' right to an independent spokesman. Proper representation demands that the union be unfettered by any conflict of interest. No group of employees should be left to wonder whether an unpopular stand was the product of a behind-the-scenes deal, or a "cosy relationship" between those who run the union and those who run the employer.

7. These concerns find expression in a variety of statutory provisions. Section 13 of the Act prohibits the Board from certifying a trade union "if any employer...has participated in its formation or administration or has contributed financial or other support to it". An organization which has been the beneficiary of employer support cannot conclude a collective agreement. Under section 48 of the Act, such agreement is deemed to be void. Indeed, section 64 of the Act expressly prohibits employer participation in the formation selection or administration of a trade union. Finally, the effect of section 1(3)(b) of the Act is to exclude from participation in collective bargaining those who, in the opinion of the Board, exercise managerial functions. This exclusion of management from the bargaining units is another recognition of the potential division of loyalties between the employees whom the union represents and the representatives of the employer. These legal controls have all been enacted to preserve the independence and the arm's length relationship to which we have referred.

8. In view of the relationship between the applicant and the respondent, the Board is of the view that granting a certificate in the instant case would be contrary to section 13 of the *Labour Relations Act*. It is said by the applicant that if the Board does not grant certification, the employees will not be able to be admitted into membership in the SIU and will

therefore lose certain advantages. The Board was advised that membership in the union is closed and that new members are only admitted as a result of a successful organizing campaign. This may be so; but if that is the result, it flows from the SIU's decision to close its membership, not the decision of this Board and, in any event, is no answer to the clear meaning and intent of section 13 of the Act.

9. For the foregoing reasons, this application is dismissed.

CONCURRING OPINION OF BOARD MEMBER W. H. WIGHTMAN;

1. While concurring with the decision reached by my colleagues, I would wish to add comments on the obiter, particularly as found at paragraphs 6 and 7.
 2. These paragraphs accurately describe the conceptualization of collective bargaining systems as provided for by the laws of most Western democracies. These laws establish a legal framework within which "labour" and "management" are effectively told to choose sides and have a fight. A less direct and more polite way of stating the foregoing is to say that public policy, as reflected in our labour laws, endorses an adversarial system of union/management relations.
 3. This adversarial approach has some attraction, if only in terms of a certain congruity, in those societies where the "class struggle" has had long tradition and meaning. It is less attractive (notionally) in the classless societies of North America.
 4. The various forms of adversarial systems which collective bargaining can be found in North America have worked with varying degrees of success at different times in our history. However, there is an increasing desire among some people to find alternative systems which do not necessitate choosing sides for purposes of a fight.
 5. This totally correct decision merely serves to illustrate the need to interpret the preamble to the *Ontario Labour Relations Act* in such a way as not to exclude the co-existence of other systems which also have as their objective "harmonious relationships between employers and employees", particularly when the alternative systems may have additional objectives such as enlargement of the economic pie, the effective training and allocation of the work force and opportunities for equal participation by employees.
 6. Finally, it should be noted, at the risk of stating the obvious, that no member of the panel intends that the decision should be interpreted as suggesting that the SIU is a weak and dependent union.
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1845-83-R International Union of Operating Engineers, Local 793, Applicant, v. **Smiths Construction Company** Arnprior Limited, Respondent, v. Group of Employees, Objectors

Bargaining Unit – Construction Industry – Petition – Practice and Procedure – Only employees at work on application date counted as unit employees in construction applications – Board not departing from rule of thumb to include employees off hunting on application date – Board not delaying inquiry into petition until its relevancy clear by final determination of bargaining unit composition – Board refusing adjournment and certifying union where petitioners with notice failed to appear and testify

BEFORE: R. O. MacDowell, Vice-Chairman, and Board Members W. H. Wightman and H. Kobryn.

APPEARANCES: *B. Fishbein, A. F. Amis and J. Redshaw for the applicant; A. P. Tarasuk and N. Smith for the respondent; John Wissent and E. Schroeder for the objectors.*

DECISION OF THE BOARD; March 21, 1984

1. This is an application for certification made pursuant to the construction industry provisions of the *Labour Relations Act*.

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7. This case raises two substantive issues: who should be treated as an employee in the bargaining unit, and how the Board should respond when objecting employees choose not to appear to give the evidence required by the Rules. Each of these questions involves the Board's established approach to the litigation of certification applications and the importance of certainty and expedition in that process. It will be convenient to deal with each issue in turn.

WHO IS TO BE TREATED AS AN EMPLOYEE IN THE BARGAINING UNIT?

8. The Act requires the Board to ascertain the number of employees in the bargaining unit at the time the application was made. There are no legislated criteria to guide the Board in this task, but, of course, there is really no difficulty in respect of those individuals both employed *and working* on the application date. The problem arises in respect of individuals who may, in some sense, be considered "employees" but who may not have been at work on the application date and may not return to work for some time thereafter, if at all. Employees on sick leave, maternity leave, long-term disability, workers' compensation, or layoff may fall into this latter category, as do the employees of a firm with a work force which fluctuates from day to day.

9. The construction industry poses special problems. Employment is necessarily transitory. Employees are quite literally "here today and gone tomorrow". A construction project is completed in phases, so on any given day the mix of tradesmen on a site may be different. Moreover, there are always the exigencies of the market, collective bargaining difficulties, the weather, and the proverbial "snafu". Collective bargaining problems, jurisdictional disputes,

controlled subcontracting arrangements, the availability of financing, and the dispersement of mortgage monies will effect the level of employment in any given trade at any particular time. So will the weather. A period of intense cold or rain will interfere with construction work and reduce the number of employees on the site until weather conditions improve. Likewise, bottlenecks, problems, or the possibility of missing a time limit or deadline may require the employment of more tradesmen to resolve the difficulties or get the project back "on the rails" even though such employment may only be on a short-term basis. For all of these reasons an employer's complement of employees may vary markedly from day to day so that, in the construction industry, it is very difficult to pin down with any precision those individuals who should be treated unequivocally as "employees" for the purposes of the *Labour Relations Act*. That is why, in the construction industry, the Board need not have regard for any increase in the employer's work force after the application for certification. And, of course, this inevitable fluctuation in the employee complement underlines the importance of the expeditious resolution of applications for certification. If there is any significant delay there will be a real possibility that any certificate ultimately issued will affect employees who were not even there when the application for certification was made. The union's support will have evaporated and bargaining rights will be largely academic. This possibility also exists in manufacturing enterprises but is minimized by the relative stability of employment over the time frame when a certification application is likely to be before the Board. Such is not the case in the construction industry.

10. To cope with these special problems in the construction industry, the Board has developed a particular rule of thumb as to the way in which it should ascertain the number of employees in the bargaining unit at the time the application was made. The Board determines the employee complement to be that which exists on the application date – fully realizing that the number may well be different the day before, or the day after and that, for example, if the application date is a rainy day, the union may find that its members are not at work so that its application may be dismissed. This "rule of thumb" has been accepted and applied by unions and employers in the construction industry for thirty years – and for a very practical reason: anything else would lead to costly and time-consuming litigation on every certification application causing delay which would severely prejudice the establishment of bargaining rights purportedly guaranteed by the statute. If time is of the essence generally in labour relations, that maxim is particularly true in the construction industry. That is why the Act expressly empowers the Board to issue certificates without a hearing where it considers it advisable to do so, and, as we have already noted, the Board need not have regard for a build-up of the work force after the application is made. Technically, a union may conclude a collective agreement even though there are no employees at the time it is entered into (see section 121), although as a practical matter, if there are no employees, there may be no bargaining leverage to induce an employer to do so.

11. The present application for certification is one of a series of similar applications made in respect of the respondent's road building operations in various parts of Northern Ontario. This application was made on November 9, 1983, which, we are told, was a couple of days after the start of the hunting season in and around North Bay. The employer submits that we should take into account the importance of the hunting ethos in Northern Ontario communities, which prompts some employees to take time off at this time of the year to engage in such activity. The employer argues that those employees who were not at work because they were off hunting should really be treated as employees in the bargaining unit despite the Board's established practice in that regard.

12. We do not accept the respondent's submission. Given the inherent instability, uncertainty, and ephemeral nature of employment in the construction industry, it would add yet another element of complexity and uncertainty if the parties and the Board had to take into account and weigh the multitude of possible reasons why an individual would not be at work for a particular employer on a particular day. No union or employer would ever know who should be included on the list submitted with the employer's reply. The issue could only be resolved after an enquiry before the Board, by which time the picture would probably have changed again. Such approach would not further the orderly and expeditious processing of construction industry certification applications in which, we repeat, time is of the essence. The Board's existing practice is neutral, easy to understand and administer, and has been applied without difficulty for more than thirty years. In particular cases it may benefit a trade union or employer but, overall, we think it is a sensible and workable compromise which is much preferable to the alternatives. This is not to say that a concern for the consequences of a particular interpretation can confute the clear meaning of a statute. However, where in a particular context the statutory language does not give an unequivocal answer, it must be of real concern for the Board to consider which of the competing interpretations urged upon us is more consistent with the orderly resolution of certification applications and the promotion of rights dealt with in the Act. And, in so doing, we do not think we can overlook the fact that the Board's existing approach is of long-standing, well accepted in the labour relations community, and provides an important element of certainty for all parties, despite the volatile environment of the construction industry.

13. In the circumstances of this case, we are not persuaded that we should depart from the Board's usual practice in the construction industry of treating the "employees in the bargaining unit at the time the application is made" as including only those employees who were working on the application date. The employer's request for a revision of its employee lists to include persons "off hunting" on the application date is therefore rejected.

THE EMPLOYEE PETITION

I

14. In support of its application for certification, the trade union filed documentary evidence of membership on behalf of more than fifty-five per cent of the employees of the respondent in the above-mentioned bargaining unit. This documentary evidence took the form of membership cards, which include a combination application for membership and an attached receipt. These cards are each signed by the subject employee, and the receipts are countersigned by a witness ("the collector") and indicate that a payment of one dollar has been made to the union in respect of its membership fees. The one dollar payment is in the nature of consideration and confirms the act of signing. There is also a certificate of membership, signed by a trade union official confirming that the individual is a member and has paid the required monthly union dues.

15. The documentary evidence is supported by a properly completed Form 80, Statutory Declaration, Construction Industry, attesting to its regularity and sufficiency. There is no allegation of any irregularity in the form of this documentary evidence, nor is there any alleged impropriety in the manner in which it was solicited. Certainly there is nothing to call into question the "voluntariness" of the individual acts of signing or to suggest that, by so doing, the employees were not indicating their desire to be represented by the applicant union. The

form and contents of this evidence are consistent with the requirements of section 1(1)(l) of the Act and, as well, it meets the form and time limits prescribed pursuant to section 103(2)(j) of the Act. This documentary evidence, standing by itself, demonstrates that the union has a level of "membership support" well in excess of that required by section 7(2) of the Act for certification without recourse to a representation vote.

16. There was also filed with the Board a "statement of desire" or "petition" signed by a number of employees indicating that they wish to oppose the certification of the applicant. This petition included the names of certain individuals who had previously signed membership cards and paid one dollar in respect of membership fees, and, therefore, were "members" of the union within the meaning of section 1(1)(l) of the Act. These individuals had had a purported change of heart, and now allegedly no longer wish to support the applicant's certification. It was apparent that if the change of heart was a voluntary one so that the union's documentary evidence may not be fully reflective of the employees' subsequent or current wishes, the Board, in accordance with its usual practice, would exercise its discretion to order a representation vote to resolve the question of the applicant's certification. This is the course of action urged upon us by both the respondent employer and the employee objectors. They argue that, in the circumstances of this case, the formalities required by the Act and the Board (writing, signatures, consideration, witnesses) are still insufficient to indicate the employees' real intentions – even though in a commercial context they might be quite sufficient to create binding and enforceable contractual obligations.

17. "Statements of desire" (see Form 78), usually in the form of a "petition", are not regulated by the Act as directly or precisely as union membership evidence. There is no statutory definition equivalent to section 1(1)(l), nor is there any requirement for a monetary payment, in the nature of consideration confirming the act of signing. There is no statutory declaration similar to Form 80 attesting to the regularity and sufficiency of the membership evidence. Nevertheless, the existence of such statements appears to be contemplated by section 103(2)(j) of the Act and Rule 73 of the Rules of Procedure; and, in any event, the Board has a long-established practice of accepting such petitions and exercising its discretion to order a representation vote where: the petition is voluntary (as evidenced by testimony adduced in accordance with Rule 73 of the Rules of Procedure), and the petition contains the signatures of a sufficient number of persons who have previously signed membership cards that there is some doubt whether these "members" (in accordance with section 1(1)(l)) continue to support its certification.

18. The Board must be satisfied however, that when these union supporters sign the petition indicating an apparent change of heart, they were doing so voluntarily and were not motivated by a perceived threat to their job security or a concern that their failure to sign would be communicated to their employer, or could result in reprisals. It is for this reason that the Board undertakes the enquiry contemplated by Rule 73(5) of the Rules of Procedure, in order to satisfy itself from the circumstances of the origination, preparation, and circulation of the petition, that the document truly represents the voluntary wishes of those who signed it. Rule 73 reads as follows:

73.-(1) Evidence of membership in a trade union or of objection by employees to certification of a trade union or of signification by employees that they no longer wish to be represented by a trade union shall not be

accepted by the Board on an application for certification or for a declaration terminating bargaining rights unless the evidence is in writing, signed by the employee or each member of a group of employees, as the case may be, and,

(a) is accompanied by,

(i) the return mailing address of the person who files the evidence, objection or signification, and

(ii) the name of the employer; and

(b) is filed not later than the termination date for the application.

(2) No oral evidence of membership in a trade union or of objection by employees to certification of a trade union or of signification by employees that they no longer wish to be represented by a trade union shall be accepted by the Board except to identify and substantiate the written evidence referred to in subsection (1).

(3) Any employee or group of employees affected by an application for certification or by a declaration of termination of bargaining rights and desiring to make representations to the Board in opposition to the application may file a statement in writing of such desire in the form prescribed by subsection (1) not later than the terminal date for the application, but this subsection does not apply where the Board grants a request that a pre-hearing representation vote be taken.

(4) An employee or group of employees who has filed a statement of desire in the form and manner required by this section may appear and be heard at the hearing or, in the case of an application to which sections 87 to 99 apply, at any hearing directed by the Board, in person or by a representative.

(5) *The Board may dispose of the application without considering the statement of desire of any employee who fails to appear in person or by a representative and adduce evidence that includes testimony in the personal knowledge and observation of the witness as to,*

(a) *the circumstances concerning the origination of the statement of desire; and*

(b) *the manner in which each signature on the statement of desire was obtained.*

[emphasis added]

The material portions of Rule 73 are also reproduced on the Form 78 Notice to Employees. The Notice specifically indicates, in bold letters, that the Board may dispose of the application

without considering the statement of desire of any person who fails to attend and that "where employees fail to attend in person or by a representative or to testify or produce witnesses to testify [concerning the origination of the material filed and the manner in which each of the signatures was obtained], the Board normally does not accept the statement of desire as casting doubt on the evidence of membership filed by the applicant". It should have been clear, therefore, that if the objecting employees did not appear to provide the supporting evidence contemplated by Rule 73(5), the Board would likely decide not to give any weight to the statement in opposition to the union's certification.

II

19. As we have already noted, the present case is one of a series of certification applications filed by the union in respect of the respondent's operations in northern Ontario. The applications respecting its Renfrew projects were filed on November 2, 1983. The present application affecting North Bay (Board area #16) was filed on November 9, 1983, and on November 10, 1983, the union filed a companion application affecting the Sudbury area (Board area #17). In both the North Bay and Sudbury cases employee petitions were filed, and in both cases the petitioners were represented by the same counsel. Rather than having two cases with the same parties and counsel proceeding separately before two different panels of the Board, it appeared more convenient, and the parties agreed (the union reluctantly), that both matters would be dealt with sequentially by a single panel of the Board beginning with the Sudbury case. The Renfrew cases were resolved by the agreement of the parties that there should be a representation vote.

20. The remaining cases were set down for hearing in December, but counsel for the employer advised that he would be in hospital on the day fixed for hearing. He requested an adjournment. Although the union was seriously concerned about the consequent delay, it was prepared to accommodate counsel and agreed to adjourn on the stipulation that the case would come back on for hearing as soon as possible. This was acceptable to counsel for the respondent and January 3rd and 11th were set aside as the dates upon which the hearing would resume. The union's worry, of course, was that given the volatility of the work force, it could be seriously prejudiced by the passage of time, even if it was ultimately successful in getting certified. A certificate would have little practical meaning if, by the time it was issued, the union's membership base had been eroded as the respondent acquired a new work force for the 1984 construction season. These concerns prompted the union to reject a subsequent request for a further adjournment because the owner of the respondent planned to be on vacation in January and would be unavailable to instruct counsel either in respect of the petition issue or the composition of the bargaining unit about which there remained some dispute despite the earlier agreement on its description.

21. The question concerning the composition of the bargaining unit was also related to the unique employment characteristics of the construction industry. Because of the fluctuating levels of employment and the periodic transfer of employees in or out of the geographic area to which the certification application applied, there was some problem in determining who, in fact, was in the unit on the application date. The resolution of this issue required the production and examination of the respondent's employment records, as well as some discussion between the parties and independent investigation. This inquiry could not take place while the owner was away, and there were some difficulties arranging meetings to settle the employee list.

22. The hearing on January 11th was scheduled for Ottawa (rather than Toronto) in order to facilitate the presence of witnesses. The respondent and the objecting employees both submitted that the case should not proceed, and the Board should not embark upon a consideration of the petition until the final composition of the bargaining unit had been settled. There was a possibility that the petition would turn out to be irrelevant because the union would be in a "vote position" in any event (i.e., its membership support would be insufficient to warrant automatic certification, so that there would necessarily be a representation vote quite apart from the effect of the petition). The respondent and the petitioners were content to have the certification application resolved by a representation vote, and argued that it would be a waste of time to inquire into the petition when there was a possibility that it might later be shown to have been unnecessary. They argued that the proceedings should be adjourned until the necessary record checks could be completed, and the parties (or the Board if necessary) had determined the precise number of employees in the unit.

23. The union strenuously resisted any further delay, pointing out that it had already sought to accommodate the respondent and that the owner's vacation plans should not have interfered with the finalization of the employee list. The union argued that there was a real likelihood that the petition would be relevant (as turned out to be the case in both applications) and that, if the inquiry was postponed, the final disposition of this application could take additional weeks or months. Meanwhile, the union's support would be melting away and with the approach of the new construction season there might be a substantially different work force. The union proposed that the finalization of the employee list and the inquiry into the petition should proceed in tandem, even though the evidence respecting the petition might later turn out to be unnecessary.

24. The Board agreed. There had already been considerable delay in the processing of these applications, there was a real likelihood of prejudice if there was any further delay, and the balance of convenience clearly favoured the mode of procedure proposed by the union. The Board ruled that it would schedule hearings for the purpose of considering the petition (i.e., the evidence contemplated by Rule 73(5)) while, at the same time, a Board Officer would meet with the parties in an effort to settle the list of employees in the unit. In retrospect, that was the correct decision. As it turned out, in each case the petition proved to be relevant, in the sense that the union had sufficient support to warrant certification without a representation vote, but if the petition were voluntary, the Board would ordinarily exercise its discretion to seek the confirmatory evidence of a vote.

25. The other matters canvassed at the hearing on January 11th were the dates and locations of the subsequent hearings. The Board heard representations concerning the availability of counsel, the availability of witnesses, and the desirability of holding the hearings in Sudbury, or North Bay, or Ottawa, or Toronto. Each location posed certain difficulties for counsel or the parties in one case or the other. Counsel for the objecting employees indicated that he had personal reasons (an impending birth) for not wanting to be away from Toronto on a number of the proposed hearing dates. Counsel for the union indicated that, if it would expedite matters, he would make himself available in Toronto with all of the union's witnesses on any dates that the Board should choose to schedule. Having heard these submissions, the Board determined that the hearings should be continued in Toronto and several days were set aside for the purpose of completing the evidence in both cases. Meanwhile, the parties would pursue the other issue with the assistance of a Labour Relations Officer. It was clear, however, and the Board expressly ruled, that it would carry on with the inquiry into the two petitions

unless and until it was affirmatively demonstrated that such inquiry would be unnecessary. The evidence respecting the petition in the Sudbury file was completed on February 16, 1984. The next hearing day was March 8, 1984, when it was anticipated that the Board would begin its inquiry into the North Bay petition.

26. In the days preceding the hearing of March 8, 1984, the Officer completed his check of the employee records, and on the morning of the hearing the count was finalized. The union had sufficient support (i.e., more than fifty-five per cent) among the employee group to warrant automatic certification so, as the Board had anticipated, the petition could be relevant to the discretion to direct a representation vote. It was therefore necessary to undertake the inquiry contemplated by Rule 73(5) as the Board had earlier done in respect of the petition in the Sudbury case. Accordingly, the Board turned to counsel for the objectors to call their witnesses and give evidence concerning the origination, circulation, and preparation of the petition document.

27. Counsel for the petitioners advised the Board that he had no witnesses to call at this time. He had spoken to his clients a couple of weeks before the hearing, and they had indicated to him that they had no wish to appear until they were positive that their testimony would be necessary. They were no longer working for the respondent. They were no longer working at all. They expressed a concern about the travel and legal costs which their continued participation in the proceeding might entail. Counsel further advised the Board that his clients had learned about the mechanics of the hearing as a result of the Sudbury case, where there also was a petition. They were by no means sure that they wanted to take part in this case and subject themselves to cross-examination. They wanted time to examine their position and decide whether they would continue their participation in this proceeding. Counsel indicated that if they chose to do so, the inquiry could continue in April on the days already set aside and on such further days as were necessary.

28. This request for an adjournment came as a surprise to the other parties, and particularly the trade union. Counsel for the trade union had contacted counsel for the objectors in the week prior to the hearing to determine whether the union's case would be reached in the first day, so that it should have its witnesses present. Counsel for the union was advised that there were potentially four witnesses on the North Bay petition, and on the strength of that comment, he assumed, not unreasonably, that the petitioners' case would consume the day, and it was unnecessary for him to have the union's witnesses present. Of course, counsel for the union and the respondent were themselves present, together with their advisers, on the day fixed for the hearing. Neither anticipated a request for an adjournment, nor had there been any request to change the location of the hearing. The union argues that the objectors are simply flouting the Board's procedural ruling, and it is no answer to say that there are other days on which the hearing can proceed. The whole purpose of the Board's ruling respecting the mode of procedure was to get on with the case on the assumption, which turned out to be correct, that the petition could very well be relevant. Nor is it sufficient for the petitioners' counsel to say, as he did at the hearing, that he did not think there was any obligation to "tip his hand" prior to the hearing itself. That may be so; but it is a little inconsistent for the objectors to complain about the possible costs of litigation while at the same time the union and the employer are put to the cost of appearing to deal with an issue with which the petitioners themselves are not prepared to proceed and which they may, upon reflection, decide not to pursue.

29. The Board is not a court, and in some respects the evidentiary and procedural formalities have been relaxed. But they have not been eliminated altogether. When the Board prescribes a mode of procedure and sets a hearing to deal with specific issues, the parties expect, and should be entitled to expect, that the hearing will proceed with those issues on that date unless there are proper grounds for an adjournment – preferably raised prior to the hearing in order to minimize the cost. A party cannot stand aside, silent, then unexpectedly say, in effect, “I will not proceed on the day fixed for hearing. I do not want to become involved unless the evidence will be decisive and I didn’t know that until today. Moreover, I still want to think about whether I want to participate at all”. We doubt whether that submission would be accepted by a court, and we certainly do not think it can be accepted by this Board – particularly when the result is a wasted day, costs thrown away, and more delay in a proceeding in which delay inevitably prejudices the applicant’s position. If the circumstances here were sufficient to derail a Board proceeding and postpone the hearing, few cases would ever proceed with certainty to an expeditious conclusion. In our view, the observations of Laskin, J.A. (as he then was) in *Hotel and Restaurant Employees and Bartenders International Union et al. v. Nick Masney Hotels Ltd.*, 70 CLLC ¶14,020 are particularly apposite to the circumstances of this case:

The Ontario Labour Relations Board deals in certification matters with fluid situations which cannot be judged by the more leisurely standards that operate in the prosecution of a claim for damages for a tort or for a breach of contract where the situation is fairly well frozen when the tort or the breach of contract has occurred. Expedition is important to a union, to employees and to an employer since the certification is merely the first step in an often labourious collective bargaining process. When, as here, adequate notice has been given of a hearing date and an opportunity afforded to make representations, the failure of a party to secure an agreement for an adjournment where it has not been misled by another party to that other’s advantage and where the Board has stood above the negotiations and has properly followed its own rules, fashioned for the protection of all parties, there is no denial of natural justice to support a successful resort to certiorari against the Board.

30. These comments apply with equal force to the circumstances of the instant case. The objectors had notice of the hearing. They had notice of its purpose: to give them an opportunity to lead evidence respecting their petition. They knew that such evidence was potentially relevant. They knew that similar evidence was led in respect of the Sudbury petition. They also knew (or ought to have known) that a failure to appear at the hearing to give their evidence would result in the Board declining to give their petition any weight. Not only are they represented by counsel, who would presumably advise them of the Rules, but also the material portions of Rule 73(5) were reproduced in bold letters on the original Notice to employees of the application. Yet, on the day of the hearing, they have not appeared and have instructed their counsel to seek an adjournment while they consider their position and continued involvement in this proceeding. The request is denied. We are not satisfied that this is sufficient reason for an adjournment which will further postpone the resolution of this application. There being no one present on the day fixed for hearing to tender the evidence contemplated by Rule 73(5), although the opportunity to do so was extended, the Board is satisfied that it should proceed on the basis of the evidence before it.

31. Having regard to the totality of the evidence before it, the Board finds that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on November 21, 1983, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

32. A certificate will therefore issue to the applicant union for the bargaining unit set out in paragraph 6 above.

33. The concurring opinion of Board Member W. H. Wightman will follow.

2620-83-R Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, Applicant, v. **T. Eaton Company Limited**, Respondent, v. Group of Employees, Objectors

Bargaining Unit – Certification – Practice and Procedure – Unit description not restricted to employer's existing single location in municipal area – Non-existent classifications not excluded – Boycott and surveillance of objector by fellow-workers part of normal byplay during union drive – Security staff's interference with objector's attempts to solicit petition part of duty to enforce employer prohibition against union activity during work hours – No interference with rights – Request for representation vote denied

BEFORE: Kevin M. Burkett, Alternate Chairman and Board Members I. Stamp and B. L. Armstrong.

APPEARANCES: *H. Buchanan, Carole Currie and Don Collins for the applicant; F. G. Hamilton, Q.C., H. A. Beresford and R. A. Hubert for the respondent; Michael Horan and Heather Didomizio for the objectors.*

DECISION OF THE BOARD; March 28, 1984

1. The name of the respondent is amended to read T. Eaton Company Limited.
2. This is an application for certification.
3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
4. There are four units appropriate for collective bargaining in this matter. These are: a full-time all-employee unit (bargaining unit #1), a part-time all-employee unit (bargaining unit #2), a full-time office and clerical unit (bargaining unit #3) and a part-time office and clerical unit (bargaining unit #4). The parties are agreed on the description of each of these units except that they are in dispute as to whether the geographic scope should be limited to the employees of the respondent at its store in the City Centre, Brampton, Ontario or to the employees of the respondent in Brampton, Ontario. The parties are also in dispute as to

whether there should be an exclusion of “personnel staff” or an exclusion of the “personnel supervisor”.

5. The respondent company argues in support of its position that these bargaining units should be framed with reference to the existing Eaton store in the City Centre, Brampton, that the company employs persons who work in Brampton other than those falling within the bargaining units for which the union seeks bargaining rights. The company referred specifically to employees who are employed by its contract division and who perform renovation work in Brampton from time to time, employees who are employed by its drapery department who install draperies in Brampton from time to time, employees in its electronic repairs department who work in the Brampton City Centre store and in private homes in Brampton from time to time and finally to delivery employees of the respondent who deliver and pick up in Brampton from time to time. All of these employees work out of locations situated within the municipality of Metropolitan Toronto. In the face of the number of employees of the company not falling within the bargaining units for which the union seeks bargaining rights who work in Brampton from time to time the company asks the Board to describe the bargaining units with which we are concerned in terms of the specific store within which those for whom the union seeks bargaining rights, work.

6. In an attempt to balance the competing interests of freedom of employee choice and stability of collective bargaining rights, the Board usually circumscribes the bargaining rights which it grants through certification by reference to the municipal boundary. In this way bargaining rights are preserved should the employer move his operation to another location within the same municipality but not if he moves his operation beyond the municipal boundary. In the latter situation the employees at the new location are free to choose, or not to choose, a bargaining agent of their choice. The Board may depart from its normal practice of circumscribing bargaining rights by reference to the municipality where an employer operates out of two or more locations within a municipality. Where the union organizes the employees at only one of these locations and where there is not a sufficient community of interest between the employees at these locations the Board may limit the unit to the employees working at a specific street address or otherwise designated location within the municipality. In these circumstances the street address is necessary to avoid confusion as to who is in the unit and who is not.

7. In this case all of the employees for whom the union seeks bargaining rights work at the City Centre store. The company does not have any other retail stores in the Municipality of Brampton. The union does not seek to represent the employees of the company who work in the Municipality of Brampton from time to time but work out of and are supervised from work locations in the Municipality of Metropolitan Toronto. Having regard to the nature of their employment it is hardly necessary to depart from the Board’s usual practice and restrict bargaining rights to the single location. A designation of all retail stores in the municipality coupled with a clarity note to the effect that employees of the company headquartered in other municipalities who work in Brampton are not within the bargaining unit avoids any confusion that might otherwise exist with respect to the status of employees who are headquartered outside Brampton but work in Brampton from time to time. In this way the traditional balance between stability of bargaining rights, on the one hand, and employee freedom of choice, on the other, is maintained as well.

8. The second area of disagreement between the parties with respect to the description

of the bargaining units is whether there should be an exclusion of "personnel staff" or an exclusion of the "personnel supervisor". At the time of application the personnel staff at the Brampton City Centre store was (and continues to be) composed of the personnel supervisor only. While the union does not dispute that the personnel supervisor should be excluded on the basis of access to confidential information in labour relations matters, it does not agree to the exclusion of other persons who may be hired in the future and who may or may not have access to this type of confidential information. The practice of the Board is to exclude from a bargaining unit only those classifications which are in existence at the time of the filing of the application. To do otherwise would invite disputes based on hypothetical job duties and responsibilities which could only be resolved on the basis of self-serving evidence. Section 106(2) of the Act provides that if, during the course of bargaining for a collective agreement or during the period of operation of a collective agreement, a question arises as to whether a person is an employee, the question may be referred to the Board for a final and binding determination. If the respondent hires additional personnel staff and if those hired are employed in a confidential capacity in matters relating to labour relations within the meaning of section 1(3)(b) of the Act, a determination can be made under section 106(2) at that time. At present, however, there is nothing to cause us to depart from the Board practice of refusing to exclude non-existent classifications. Having regard to the foregoing the "personnel supervisor" will be excluded from each of the bargaining units in this case.

9. Finally, the parties are in dispute as to whether Mr. Butler exercises managerial authority within the meaning of section 1(3)(b) of the Act and should be excluded from bargaining unit #1. Accordingly, the Board hereby appoints a Board Officer to meet with the parties, inquire into the duties and responsibilities of Mr. Butler and report to the Board.

10. Having regard to all of the foregoing, the Board hereby finds that all employees of the respondent at its retail stores in Brampton, Ontario, save and except sales managers, merchandise presentation managers, food services managers, foremen, persons above the rank of sales manager, merchandise presentation manager, food services manager and foremen, office and clerical staff, employees at Eaton Travel Ltd., management trainees, personnel supervisor, security staff, medical services nurse, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period and students employed on a co-operative programme with a school, college or university, (hereinafter referred to as bargaining unit #1) constitute a unit of employees of the respondent appropriate for collective bargaining.

CLARITY NOTE: For purpose of clarity the Board notes that employees of the respondent headquartered or working out of other municipalities who work in Brampton are not within the bargaining unit.

11. The Board further finds that all employees of the respondent at its retail stores in Brampton, Ontario regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except sales managers, merchandise presentation managers, food services managers, foremen, persons above the rank of sales manager, merchandise presentation manager, food services manager and foreman, office and clerical staff, employees of Eaton Travel Ltd., management trainees, personnel supervisor, security staff, medical service nurse, and students employed on a co-operative programme with a school, college or university, (hereinafter referred to as bargaining unit #2) constitute a unit of employees of the respondent appropriate for collective bargaining.

CLARITY NOTE: For purpose of clarity the Board notes that employees of the company headquartered in or working out of other municipalities who work in Brampton are not within the bargaining unit.

12. The Board further finds that all office and clerical employees of the respondent at its retail stores in Brampton, Ontario, save and except managers, those above the rank of manager, employees of Eaton Travel Ltd., personnel supervisor, security staff, secretary to the store manager, medical services nurse, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period and students employed on a co-operative programme with a school, college or university, (hereinafter referred to as bargaining unit #3) constitute a unit of employees of the respondent appropriate for collective bargaining.

CLARITY NOTE: For purpose of clarity the Board notes that :

- (1) All employees of the company headquartered in or working out of other municipalities who work in Brampton are not within the bargaining unit.
- (2) Managers include sales manager, merchandise presentation managers, food services managers and office manager.

13. The Board further finds that all office and clerical employees of the respondent at its retail stores in Brampton, Ontario regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except managers, those above the rank of manager, employees of Eaton Travel Ltd., personnel staff, security staff, secretary to the store manager, medical services nurse and students employed on a co-operative programme with a school, college or university, (hereinafter referred to as bargaining unit #4) constitute a unit of employees of the respondent appropriate for collective bargaining.

CLARITY NOTE: For purpose of clarity the Board notes that:

- (1) Employees of the respondent headquartered in or working out of other municipalities who work in Brampton are not within the bargaining unit.
- (2) Managers includes sales manager, merchandise presentation managers, food services managers and office manager.

14. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in each of bargaining units #1, #2, #3 and #4 at the time the application was made, were members of the applicant on February 21, 1984, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

15. The dispute as to the status of Mr. Butler cannot effect the applicant union's entitlement to certification in bargaining unit #1. The applicant trade union has filed membership

cards which have been duly signed and a dollar paid by well in excess of fifty-five per cent of those in each of the bargaining units. The overall support evidenced by the union across all of the bargaining units is in excess of 80%. The documentary evidence of membership is supported by a properly completed form 9 attesting to its regularity and sufficiency. There is no allegation of any irregularity in the form of this documentary evidence, nor is there any alleged impropriety in the manner in which it was solicited. Certainly there is nothing to call into question the "voluntariness" of the individual acts of signing or to suggest that, by so doing, the employees were not indicating their desire to be represented by the applicant union. The form and content of this evidence are consistent with the requirements of section 1(1)(l) of the Act and, as well, it meets the form and time limits prescribed pursuant to section 103(2)(j) of the Act. This documentary evidence, standing by itself, demonstrates that the union has a level of "membership support" well in excess of that required by section 7(2) of the Act for certification without recourse to a representation vote. However, notwithstanding the absence of a relevant statement of desire (the statement in opposition filed in this case was signed by only seven employees and only one of these also signed a union membership card) a request was filed by an objecting employee in this matter to nevertheless exercise our discretion under section 7(2) of the Act to direct the taking of a representation vote. This request is made on the basis of allegations of "studied intimidation and coercion practised by the applicant and its agents in contravention of the provisions of sections 70 and 80(2) of the *Labour Relations Act*."

16. The allegations of coercion and intimidation in support of the request that the Board exercise its discretion under section 7(2) of the Act to direct the taking of a representation vote were made by Mrs. Heather Didomizio, a ten year Eaton's employee who presently works as a display artist for the company and spends about 90% of her working hours at the Brampton City Centre store. She reports to Mr. Patrick Shank, the manager of visual presentation, who, in turn, reports to Mr. Lemon, the store manager. Mrs. Didomizio was approached by a union supporter on February 6, 1984 and asked to join the union on February 8, 1984. She immediately voiced her objection and attempted to obtain information from the Provincial Government as to how she might oppose the union. When she received pro-union literature from the Women's Bureau she went to Mr. Lemon, the store manager, told him of her concern and was provided with two pamphlets dealing with the *Labour Relations Act* and certification. Mrs. Didomizio made contact with two other employees who opposed the union on February 10th, one of whom is the secretary to the store manager. She then prepared a statement opposing the union which she posted beside the notice of application for certification which had been posted by this time. However, she was then advised by the secretary to the store manager, who had typed the notice, that Mr. Lemon wanted it taken down. Mrs. Didomizio removed the notice but prepared a statement of desire which she began to circulate on February 14th. She testified that she did not have much success in obtaining signatures in opposition to the union and when asked why, she replied that some of the employees she approached just smiled like they were in a daze and said nothing while others said they were neutral. She elaborated in cross-examination that those who appeared dazed, "didn't want to hear what I had to say."

17. Mrs. Didomizio returned to the store after her working hours on February 15th and approached fellow employees who were working with the purpose of providing them with an opportunity to sign the statement in opposition to the union. She was confronted by Ms. Helen Townsend (whom she identified as the manager of security) and Mr. Grant McDonald (another member of the store's security staff) and told that a complaint had been made and that she

was not supposed to be in the store doing what she was doing. She was asked to leave. She did not leave the store but moved to another department and approached the employees there. She testified that she was observed by Mr. McDonald but that he did nothing. Mrs. Didomizio continued to circulate the statement on February 16 and February 17. When asked if the security staff could affect her employment she replied that her job could be jeopardized if a member of the security staff reported that she had engaged in theft.

18. Mr. Lemon, the store manager, had the following letter, over his signature, dated February 15, 1984, delivered to all of the store's employees:

TO ALL EMPLOYEES:

As a result of questions being asked about the green Notices posted yesterday regarding a Union's application to the Labour Relations Board, some explanation is in order. In making this application, the Union is attempting to become your sole representative in all your future dealings with Eaton's concerning your terms of employment.

In this connection you may have been asked to sign a Union membership card so that there will be a vote. Do not be misled. If a Union has membership cards of more than 55 per cent of the eligible employees, it is entitled to automatic certification as bargaining agent without a vote being taken. If a Union has membership cards of between 45 per cent and 55 per cent of the eligible employees, the Labour Board normally holds a vote and if more than 50 per cent of those voting favour a Union, the Union is certified.

It is the practice of the Labour Board to permit a Union to file membership cards with the Board that are signed up to the "terminal date" which in our case is February 21st. If you sign up just to keep from being pestered or because someone says they need "a few more", you may never get a vote.

Also, if certified, the Union can demand that a collective agreement requires the deduction of Union dues from every full and part-time employee's regular pay whether a Union member or not.

In answer to questions some of you have been raising, the Company's policy as to union representation, which is in strict keeping with the law, is summarized as follows:

- each employee is entitled to join a Union of his or her choice;
- each employee is equally entitled not to join a Union;
- no person - representing either a Union or Management - is entitled to interfere with you in making your decision;

- *no person is entitled to solicit membership or carry on Union activities during working hours.*

There are, however, some questions you should ask yourself before deciding about Unions:

1. What obligations will be placed on me if I join?

Membership in a Union is like signing a contract. You are legally bound by the conditions contained in the Union constitution and by-laws.

2. What does the Union's constitution have to say about assessments on my pay and about Union fines?
3. How much will I have to pay each month in regular or special Union dues?
4. Will I have to go on strike if the Union tells me to?

You may be asked to sign a Union card in the near future. Before you decide what to do, give careful consideration to these questions. We are all in the selling business and know that we should investigate carefully any product or service before making a decision to purchase.

(emphasis added)

Mrs. Didomizio agreed in cross-examination that the prohibition against soliciting membership or carrying on union activities during working hours extended to anti-union activities carried on on store premises as well. We might note at this point that section 71 of the Act reads as follows:

71. Nothing in this Act authorizes any person to attempt at the place at which an employee works to persuade him during his working hours to become or refrain from becoming or continuing to be a member of a trade union.

19. Mrs. Didomizio testified that during the period she was actively opposing the trade union the "traffic flow" of other employees through her work area increased substantially. She testified that a number of known union supporters passed through her work area on a regular basis. She testified that "all eyes were on me and no one was speaking to me any more." She testified that on one occasion when she went to the washroom another employee followed her. She testified that Sandra Lockwood, a sales person, said that she was going to report her to Mr. Lemon. Mr. John Clark, the Union's staff representative who directed the organizing campaign, acknowledged that employees at the store were reporting to him on the activities of Mrs. Didomizio but denied that anyone had been instructed to watch her or that he had communicated with anyone from security with respect to her activities. None of the persons whom Mrs. Didomizio identified as having passed through her work area during the relevant period were members of the security staff.

20. Mrs. Didomizio again returned to the store after her working hours on Friday, February 17th. She had already been reported to the store manager on one occasion by Helen Townsend, the manager of security, so she took up a position at the entrance to the store. She testified that Paul Wannamaker, an appliance salesman, exited the store with his wife, then re-entered the store, appeared with a camera and took her picture. Pat Tierney, a member of the security staff, had approached and cautioned her earlier the same day. Mrs. Didomizio testified that she told Ms. Tierney to take a walk and that Ms. Tierney replied “you’ll be the one taking the walk” and said that she would be reporting her to the union. Mrs. Didomizio testified that she took from these remarks that she would probably lose her job, although no comment to that effect was ever actually made. Mrs. Didomizio approached Mr. Lemon in his office on each occasion when she felt harassed and complained about the treatment she was receiving. Mr. Lemon recorded her complaints but did not otherwise respond.

21. Mrs. Didomizio forwarded a statement of desire to the Board on Saturday, February 18th bearing only seven signatures. She was unsuccessful in obtaining any additional signatures prior to the February 21 terminal date.

22. Mrs. Gwen Gray, an inventory control clerk who works in the same general area as Mrs. Didomizio, confirmed Mrs. Didomizio’s evidence that there were more employees than usual passing in and out of Mrs. Didomizio’s work area. Mrs. Gray estimated that she approached ten to twelve employees seeking signatures in opposition to the application but testified that none of those she approached signed the statement of desire. When asked why she did not approach a greater number of employees Mrs. Gray replied that she was not getting anywhere and that she was busy in the office.

23. Ms. Dagmar Jenett, a customer accounts clerk reporting directly to Mr. Lemon, testified that she opposed the union and signed the statement in opposition. It is her evidence that shortly after signing the statement, Mrs. Tierney (a member of the security staff) approached and confronted her with the fact and asked if she had done so on company time or on her own time. Ms. Jenett testified that when she replied that she had done so on her own time Ms. Tierney said that she would have to report her to the union. Mrs. Jenett testified that she was upset to the point that she went to Mr. Lemon in tears and asked for permission to go home where she remained for two days with, in her own words, nervous tension.

24. The union did not seek the exclusion of security staff from the bargaining units that it proposed as appropriate in its application. However, the union agreed in pre-hearing consultation with a Board Officer that security staff should be excluded from these bargaining units.

25. Counsel for the objecting employees maintains that under section 2(d) of the *Charter* and under section 3 of the *Labour Relations Act* an employee’s freedom to either join a trade union or to oppose a trade union is guaranteed. He argues that in this case there has been an interference with this freedom as evidenced by the surveillance to which Mrs. Didomizio was subjected and the tactics employed by the security staff. In the absence of any evidence to the contrary he argues that we must accept the evidence of the objecting employees as to what transpired in the work place at the relevant times and cites *Empco-Fab Ltd.*, [1982] OLRB Rep. Aug. 1162 in support of the proposition that a “hands off” approach is required. *K-Mart Canada Limited (Peterborough)*, [1981] OLRB Rep. Jan. 60. and *Securicor Investigation and Security Ltd.*, [1983] OLRB Rep. May 720 are cited in support of the proposition that

surveillance of employees in the work place has a chilling effect that interferes with the exercise of the basic employee freedoms referred to above. It is the submission of counsel for the objecting employees that where security staff who openly support the union and at the same time are in a position to affect the employment status of other employees, threaten employees who are opposed to the union, they provide a "vigilante service for the union." Counsel for the objecting employees asks the Board to take into account the chilling effect upon employee freedom of choice caused by the surveillance and isolation of the anti-union supporters and the tactics of the security staff and, notwithstanding the membership support evidenced by the union, exercise its discretion under section 7(2) of the Act to seek the confirmatory evidence of a representation vote.

26. Counsel for the respondent company also characterizes the issue as one of interference with the fundamental right of an employee to join or not to join a trade union. He asserts that whereas the company was scrupulous in adopting an even-handed and neutral approach, the trade union accepted members of the security staff into membership and then used these individuals and the positions they occupy to their advantage. Counsel for the respondent company points to section 12 of the Act which requires security guards to be represented by trade unions that represent only security guards. In the face of the statutory policy of segregating security guards in recognition of their functions and their control over other employees, the company questions the motive of the union in admitting security personnel into membership. In the face of the conduct of the security staff in this case, vis-a-vis those opposing the trade union, the company submits that we should exercise our discretion under section 7(2) if the Act to direct the taking of a representation vote.

27. The union asks the Board to draw a distinction between surveillance by fellow employees in the context of an organizing campaign and surveillance by the employer or its agents as was the case in both *K-Mart Canada Ltd. (Peterborough)*, *supra* and *Securicor Investigation and Security Ltd.*, *supra*. The union maintains that surveillance by fellow employees may fairly be characterized as a normal interchange generated by a union organizing campaign while surveillance by the employer, who has control of the employment relationship, is quite another matter and may constitute, as the Board found in the cases cited, an unfair labour practice. The union takes the position that the store's security staff are not security guards within the meaning of section 12 of the Act. It is the submission of the union that in this case security staff were excluded on the basis of a potential conflict of interest because of their responsibility to report theft. In any event, the union relies on the evidence of Mr. Clark that he did not direct the security staff nor receive reports from them with respect to Mrs. Didomizio. The union relies on *Re Alderbrook Industries Limited*, [1981] OLRB Rep. Oct. 1331 at paragraphs 12 and 13 as standing for the proposition that the Board accepts that there may be conflict between employees who take different sides in an organizing campaign and that the Board does not attempt to regulate this conduct except where coercion or intimidation are present. The union describes Mrs. Didomizio as overly sensitive to events which fall within the realm of the normal interchange generated by a union organizing campaign and asks the Board to certify it on the basis of the plus 80 per cent membership support which it has evidenced.

28. If we understand the submissions of both the objecting employees and the respondent company, it is argued that the rights of both the employees who sought to actively oppose the union and those whom they hoped to persuade have been interfered with. This Board has extensive experience in dealing with the conduct of those involved in or directly affected by

a union organizing campaign. In regulating the conduct associated with an organizing campaign the Board has been careful to distinguish between the actions or statements of responsible company or union officials on the one hand and rank and file employees on the other. The Board has adopted a “reasonable employee” test – asking itself if the conduct complained of would interfere with the rights of a reasonable employee. An employer has control over the employment relationship and, therefore, as the respondent points out, the Board has imposed rigorous standards upon an employer during a union organizing campaign. A trade union does not have control over the employment relationship and is not, therefore, in the same position as an employer to intimidate or otherwise interfere with the rights of employees under the Act. Nevertheless, trade union conduct that would interfere with the rights of a reasonable employee is also proscribed under the Act. Finally rank and file employees, although not in the same position of potential authority as a trade union, may also unlawfully interfere with the exercise of employee rights under the Act. The distinction which the Board draws between the conduct of a union official and that of a rank and file employee, and the attempt by the Board to adopt a realistic view of work place exchanges during an organizing campaign, as set out in *Re The Kendall Company (Canada) Limited*, [1975] OLRB Rep. Aug. 611 as follows is relevant to this case:

A reading of these cases demonstrates the Board’s sensitivity to the realities of organizational activity. Improper conduct on the part of union officials may be symptomatic of much broader unlawful actions. Moreover, threats by trade union officials have a ring of malice that is qualitatively different from the disfavour of a fellow employee caught up in the “heat” of campaign activity. A fellow employee’s threat is likely to be recognized for what it is – “an isolated outburst by a hot-headed partisan”. Further, such persons are seldom capable of carrying out their threats and for this reason men and women of ordinary convictions are not likely to be inhibited from exercising rights under the Act.

• • • •

As observed in *Dupont of Canada Ltd.* [1961] OLRB Rep. 360, it would be unwise for the Board “to act as a censor of social pressures used to persuade employees to join or not to join the union or to oppose or not to oppose a union unless the pressure is of such a nature that it places a person’s employment in jeopardy either directly or by implication”. A contrary position would be oblivious to human nature and result in artificial standards that would adversely affect the rights of all employees under the legislation.

(See also *Alderbrook Industries Limited*, *supra* and *Walbar of Canada Inc.*, [1982] OLRB Rep. Nov. 1734.)

29. There is no evidence in this matter that any official of the applicant trade union ever spoke to Mrs. Didomizio or any other objecting employee. Rather, this complaint, insofar as it has been dealt with in evidence, is in respect of the conduct of certain rank and file employees and certain members of the security staff who, it is argued, as pro-union supporters, relied upon their power to affect the employment of others to interfere with the rights of employees opposed to the trade union. Dealing firstly with the conduct of Mrs. Didomizio’s

fellow employees. Mrs. Didomizio, as was her right, spearheaded the opposition to the trade union. She posted a notice opposed to the union, spoke out openly against the trade union and prepared and circulated a statement of desire in opposition to the trade union. In response, fellow employees who were in favour of the trade union kept a careful watch over her movements and activities in the store, did not speak to her and, on one occasion, a pro-union employee took her picture at the entrance to the store. In our view, there is nothing in the conduct of Mrs. Didomizio's fellow employees that can be characterized as anything other than the normal byplay which sometimes develops between pro-union employees and those opposed to the union. It is hardly surprising that union supporters would be disposed to "keep an eye" on someone who, despite their employer's injunction against union activities on company time, was engaged in opposition to the union, and was regularly conferring with the store manager during the relevant period. Their conduct would not have had any effect whatsoever on a "reasonable" employee and did not interfere with the exercise of Mrs. Didomizio's rights or the rights of anyone else.

30. The evidence clearly establishes that members of the security staff interfered with Mrs. Didomizio's attempts to circulate the statement in opposition to the trade union on store premises during the working hours of the employees she was canvassing. On the evidence before us one member of the security staff threatened to report Mrs. Didomizio to the store manager while another, after telling Mrs. Didomizio that she would be the one to take a walk (in response to Mrs. Didomizio's remark to her that she should take a walk) threatened to report her to the union. Mrs. Didomizio testified that she took from the retort of the security staff member that she would be the one to take a walk that she would probably lose her job. Before dealing with the specifics of the exchanges between Mrs. Didomizio and the various members of the security staff, two observations must be made. Firstly, no member of the security staff, although many may have been union supporters, was under the direction of or reported to the union with regard to Mrs. Didomizio. Secondly, the company expressly prohibited the solicitation of union membership or the carrying on of union activities during working hours on February 15, 1984. Mrs. Didomizio by her own evidence, interpreted this prohibition to extend to the solicitation of anti-union support during working hours. In these circumstances, it was entirely consistent with their function for members of the security staff to interfere with Mrs. Didomizio's attempt to obtain signatures on the statement of desire opposed to the union which she was circulating during working hours and nothing untoward is to be taken from their reporting Mrs. Didomizio's activities in this regard to the store manager. The threat to report her to the union, which on Mrs. Didomizio's evidence was made by one member of the security staff, carries no greater weight than the same threat uttered by a fellow rank and file employee. Mrs. Didomizio made no attempt to hide her opposition to the union. In these circumstances that remark should not have had any effect whatsoever on the continued exercise of her right to oppose the trade union. Finally, we are at a loss to understand how Mrs. Didomizio could have taken from the comment of the security staff member (in response to Mrs. Didomizio's directive to "take a walk") that she would probably lose her job. Mrs. Didomizio had been in contact with Mr. Lemon, the store manager, from the outset. She bypassed her immediate supervisor and reported her various exchanges with the security staff to him testifying that she was in his office "four, five or six times" complaining about the treatment she was receiving. The evidence is that Mr. Lemon, who had authority over the security staff, recorded her complaints but did not admonish her or in any way suggest that her employment was in jeopardy. We do not accept that Mrs. Didomizio ever had any concern that her employment was in jeopardy. If Mrs. Didomizio feared the authority of the security staff she would not have disregarded their directions as readily as she did, nor

would she have told a member of the security staff to “take a walk”, nor would she have reported their activities to Mr. Lemon, the store manager. There was no evidence led with respect to the actual authority of the security staff although it can be inferred from the evidence of Mrs. Didomizio that the role of the security staff in this store is similar to that generally played by security staff in a retail store; that is, a monitoring and apprehending function in respect of theft, pilferage or other misconduct but no general authority over the employment relations of store personnel. We are not satisfied that the lawful right of Mrs. Didomizio to oppose the trade union was unlawfully interfered with or that it was reasonably perceived by anyone to have been interfered with.

31. We accept the evidence of Ms. Dagmar Jenett that she had an exchange with Ms. Pat Tierney, a security staff member, in which she was confronted with the fact of signing the statement against the trade union and told that she would be reported to the union. We further accept that Ms. Jenett was shaken by this encounter and took two days away from work to overcome the “nervous tension” caused by it. However, as we have found, Ms. Tierney was not acting under the direction or control of the trade union and, in the absence of evidence to establish any further interchange between members of the security staff and bargaining unit employees who had not publicly expressed opposition to the trade union, we must characterize it as an isolated event. Although Ms. Jenett may have felt threatened, we are not satisfied that the interchange between Ms. Tierney and Ms. Jenett could reasonably have inhibited the rights of the respondent’s employees to either support or oppose the trade union and it clearly did not deter Mrs. Didomizio from her opposition to the trade union.

32. Mrs. Didomizio testified that from the outset (prior to any of the alleged misconduct) she “did not have very good success” in circulating the statement in opposition to the trade union and elaborated that the employees she approached “didn’t want to hear what I wanted to say.” In the face of our finding that there has been no interference with her right to oppose the trade union or with the rights of other employees to either support or oppose the trade union, the fact that only seven signatures were obtained on the statement in opposition to the union (only one of those by an employee who also signed a card in support of the union), from a total of 185 bargaining unit employees is consistent with a finding that the expression of support in the form of a signed membership card and the payment of \$1 by more than 80 per cent of the respondent’s bargaining unit employees is an expression of the true wishes of these employees.

33. Accordingly, having regard to all of the foregoing and to the membership support enjoyed by the applicant trade union in each bargaining unit, we hereby certify the applicant trade union as bargaining agent for the employees of the respondent company who fall within bargaining unit #1, bargaining unit #2, bargaining unit #3 and bargaining unit #4; each of which has herein been described. Because of the dispute with respect to the status of Mr. Butler, the Board has proceeded under section 6(2) of the Act with respect to bargaining unit #1. The issuance of the formal certificate in respect of bargaining unit #1, therefore, must await the resolution of that dispute. Formal certificates will issue immediately in respect of bargaining units #2, #3 and #4.

34. This matter is hereby referred to the Registrar.

1418-83-R; 1419-83-R; 1420-83-R; 1421-83-R; 1422-83-R; 1466-83-R; 1467-83-R
 United Food and Commercial Workers Union, Applicant, v. **Waterloo Spinning Mills Ltd.**, Respondent; United Food and Commercial Workers Union, Applicant, v. **Strutex Fibres Ltd.**, Respondent; United Food and Commercial Workers Union, Applicant, v. **Chrome Print**, Respondent; United Food and Commercial Workers Union, Applicant, v. **Kraus Carpet Mills Ltd.**, Respondent; United Food and Commercial Workers Union, Applicant, v. **Varichrome Yarns**, Respondent; **Allen Steckly**, Complainant, v. **Kraus Carpet Employees Association**, Respondent; **Allen Steckly**, Applicant, v. **United Food & Commercial Workers Union CLC-AFL-CIO**, Respondent

Successor Status – Trade Union – Employee association's constitution not providing for merger – Membership meeting amending constitution to permit merger and approving merger by single vote – Whether unanimity required for merger – Whether single combined vote to amend constitution and approve merger irregular – Mere possibility of impropriety with no evidence not sufficient to question vote

BEFORE: R. O. MacDowell, Vice-Chairman, and Board Members I. Stamp and S. Cooke.

APPEARANCES: *Beth Symes, Abe Peters, Joseph MacNeil and Cliff Evans for the United Food and Commercial Workers Union and Kraus Carpet Employees Association; R. C. Filion, Q.C., and F. Guthier for the respondent companies; T. S. Kelleher for Allen Steckly.*

DECISION OF THE BOARD; March 26, 1984

I

1. These are a series of applications under section 62 of the *Labour Relations Act* which were heard together with a related section 89 complaint. The applicant union ("the UFCW") claims that it is the successor of the Kraus Carpet Employees Association ("the Association") by reason of a merger with the latter organization. The respondent employers contend that the Association had no power to merge and, in the alternative, that the steps taken were insufficient to effect a merger. The complainant, Allen Steckly, asserts that the merger process involved a breach of section 68, the duty of fair representation. For reasons which will shortly become apparent, the Association, as such, took no part in these proceedings. Sections 62 and 68 read as follows:

62.-(1) Where a trade union claims that by reason of a merger or amalgamation or a transfer of jurisdiction it is the successor of a trade union that at the time of the merger, amalgamation or transfer of jurisdiction was the bargaining agent of a unit of employees of an employer and any question arises in respect of its rights to act as the successor, the Board,

in any proceeding before it or on the application of any person or trade union concerned, may declare that the successor has or has not, as the case may be, acquired the rights, privileges and duties under this Act of its predecessor, or the Board may dismiss the application.

(2) Before issuing a declaration under subsection (1), the Board may make such inquiry, require the production of such evidence or hold such representation votes as it considers appropriate.

(3) Where the Board makes an affirmative declaration under subsection (1), the successor shall for the purposes of this Act be conclusively presumed to have acquired the rights, privileges and duties of its predecessor, whether under a collective agreement or otherwise, and the employer, the successor and the employees concerned shall recognize such status in all respects.

68. A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

2. The UFCW is an International union with a wide Canadian membership. It is one of the largest unions in Ontario, representing employees in a variety of industries. Its historical roots were in the food industry, but it now bargains for such diverse groups as pharmacists, retail clerks, and employees in a funeral parlor. It represents the employees of at least one other carpet mill. The UFCW is itself the result of the merger, over the years, of several unions representing employees in various sectors of the economy.

3. The separate corporate identity of some of the respondents is a little misleading. They are all engaged in related activities under common control, and all but Waterloo Spinning operate from the same premises in Waterloo, Ontario. Waterloo Spinning has its own premises about two miles away. The Board was advised that Kraus Carpet Mills Ltd. is divided into two divisions: Chrome Print and Varichrome Yarns. For ease of reference, the related employer respondents in these separate applications will be referred to simply as "the employers".

4. The Association is the bargaining agent for the employees of these related entities. There are five separate collective agreements: one each for Kraus, Strudex, Waterloo Spinning, Chrome Print, and Varichrome Yarns. At the time of the purported merger, there were 445 employees who were bound by these agreements and were members of the Association.

5. Except for Varichrome Yarns, where the Association was voluntarily recognized, bargaining rights were initially based upon certificates issued by this Board. The first certificate was issued on August 3, 1972 in respect of the employees of Kraus Carpet Mills Ltd. That presumably explains the Association's name and certain provisions in its constitution to which we will refer below.

6. Before turning to the application of section 62, it is necessary to sketch in some of the events preceding the purported merger between the Association and the UFCW. As it turned out, much of the evidence was not substantially in dispute.

II

7. As early as the spring of 1983, the elected officers of the Association began to consider merger or affiliation with a larger trade union organization in order to enhance the Association's bargaining power, and the quality of service which it could provide to its members. Discussions were opened with a representative of the UFCW and when those discussions proved fruitful, the Association called upon its solicitors for assistance in negotiating the terms of merger. By mid-summer, those terms were finalized and the executive and their solicitors began to take the steps considered necessary to effect the proposed merger with the UFCW. On or about August 19, 1983, each member of the Association was mailed the following notice:

NOTICE TO ALL EMPLOYEES

AUGUST 19, 1983

The Executive of the Kraus Carpets Employees Association hereby gives notice in writing to all employees that a meeting of the Association will take place on:

Thursday, September 10, 1983
In Waterloo
At 1:00 P.M.
In The Ballroom
Of The Waterloo Motor Inn

in order to permit the members of the Association to discuss and vote to amend the Constitution of the Association to permit a *merger* with the United Food and Commercial Workers Union.

A copy of the agreement between the United Food and Commercial Workers Union and the Kraus Carpets Employees Association which sets forth the terms of the merger is attached to this notice.

This is a very important meeting which will chart the future of your Association for the next few years. It is important that you attend, hear the presentation by the Executive, ask questions and vote.

To this notice were attached two additional documents: a background statement about the UFCW, and a letter from the Association's solicitors to the Canadian director of the UFCW setting out the agreed terms. These documents read as follows:

I

You have received, together with the Notice from your Executive explaining the details to you, information to vote to join the United Food & Commercial Workers International Union (U.F.C.W.), on September 10, 1983. We would like to take this opportunity to tell you about our (your new) Union, U.F.C.W.

We are 1.3 million members strong in North America; 140,000 members in Canada; 45,000 members in Ontario. Big does *not always* mean better. In our case, we believe it does, and we want to show you why.

Many of the laws passed in Ottawa effect working people. OTTAWA LISTENS TO OUR UNION. We, as a Union, take every opportunity to tell Ottawa the effect their laws have on our members. Queen's Park (Government of Ontario) passes laws that effect us in Ontario. Ontario M.P.P.'s *listen* to our Union! Employers make decisions that effect employees and employers listen to our Union. We know your employer will *listen* to you *more* as a member of the 1.3 million U.F.C.W. with its financial and personnel resources.

In addition to belonging to U.F.C.W. all of our members in Ontario belong to the 800,000 member Ontario Federation of Labour (O.F.L.). The O.F.L. is a group of unions who work together to make life better for working people in Ontario. You will also be part of the Canadian Labour Congress (C.L.C.) with its approximately two million members. The C.L.C. is a group of national and international unions who work together across Canada to help working people.

The U.F.C.W. is an important partner in both of these organizations, and when you belong to the U.F.C.W. you know you have the support of literally millions of working people when you deal with *your* employer.

Your Association has worked well for you in the past and has accomplished much for its members. Your Executive believes that in these tough times and facing a very tough employer you need the *strength and support* of the U.F.C.W. As a Local Union within the U.F.C.W. you will become part of the family of over 200 locals in Canada. You will continue to govern your own affairs and elect your own executives, but also be able to call on the resources of this union to assist you.

It is impossible to tell the full story of the U.F.C.W. in a few words. Its [sic] our hope you will endorse your Executive's decision, and join the United Food & Commercial Workers. We are a strong and growing union and we would like the employees of Krause [sic] Carpets to grow with us.

II

I have been retained by the Kraus Carpets Employees Association with respect to the proposed merger with the Food & Commercial Workers Union. This letter is to confirm the agreement reached between the Executive of the Kraus Carpets Employees Association and yourself on behalf of the United Food and Commercial Workers Union with respect to the terms of the proposed merger.

This letter will be circulated to all employees and will form the basis of the membership meeting to be held on September 10, 1983, in order to amend the Constitution of the Association.

The Executive of the Krause [sic] Carpets Employees Association will recommend to the membership that the Executive of the Association will apply to the United Food and Commercial Workers Union to become a separate Chartered Local of that Union.

The present Executive Officers of the Association will continue to be the officers of the new Local of the United Food and Commercial Workers Union until December 31, 1984, and will continue to be remunerated by the Local Union on the current basis.

The funds currently belonging to the Association will be placed in a separate bank account by the Association and will be held in trust by the Executive of the Local for the benefit of the members of the Association. The United Food and Commercial Workers Union will make no claim to the said funds.

The United Food and Commercial Workers Union will provide full Union services to the Executive, Stewards and members of the new Local and will assist them in the organization, education and servicing of the local membership.

The United Food and Commercial Workers International Union agrees to provide the services of Abe Peters or another representative that is mutually agreeable between the new Local Union and the International Union to assist the new Local Union in contract negotiations, servicing the membership, grievance procedure, arbitrations, organizing, education of the membership, etc. The International Union agrees that this assistance shall be, but not limited to, for a period of approximately ten days per month for a twelve month period, and that it be renewed after that period if the Local continues to have need of these services.

The new Local will be given a jurisdiction to organize the employees of the manufacturers of carpets and related companies in the following counties: Bruce, Gray, Huron, Perth, Wellington, Dufferin, Simcoe, Peel, Halton, Waterloo, Oxford, Brant, Hamilton-Wentworth, Niagara, Haldeman-Norfolk.

The per capita levy to be paid to the United Food and Commercial Workers Union will be \$5.25 per month per member as of September, 1983. This amount may vary from time to time, if changed by the membership of the International Union. The International Union agrees to waive the initiation fee for all current members of the Association.

The United Food and Commercial Workers Union understands that the proposal for merger and the terms of the merger will be placed before the membership of the Association at a meeting to be held on September 10, 1983. If the membership of the Association votes on that date to approve the merger, the Executive of the Association will apply forthwith to be a chartered Local of the United Food and Commercial Workers Union. The International Union agrees to make an application to the Ontario Labour Relations Board for successor rights to the Kraus Carpets Employees Association so that the new Local can continue to represent all employees.

This documentary material was also translated into Portuguese and Serbo-Croatian since there were employees from both ethnic groups among the Association's membership and the executive wanted to be sure that all of its members were aware of the purpose of the meeting. Following the issuance of this notice, there were further notices to correct the error apparent on the face of the first one: September 10, 1983 is a Saturday, not a Thursday as the notice suggests. Neither the respondents nor the objecting employees attach any significance to this error which, it is conceded, was subsequently corrected.

8. Following the mailing of this notice, there was an active debate among the employees about the pros and cons of the proposed merger. The employer was not absent from this debate. On or about August 29, 1983, members of management handed out the following letter from Erwin Wagner, executive vice-president and chief operating officer of Kraus:

On September 10, 1983 you will be asked to vote on the proposed merger of your Union, The Kraus Carpet Employees Association and an outside International Union called the United Food and Commercial Workers' Union.

Even though the vote will be held on a Saturday, it is important that every employee takes the time to attend the meeting and vote, because it could be the most important decision of your working career. At the meeting, you will essentially be asked whether you wish to continue to be represented by your own Association, or whether you will be represented by a group of outsiders who are strangers to our Company and to our Industry.

During the next two weeks, there will be a lot of questions asked by employees in trying to decide how to vote. We will attempt to help as much as possible in answering these questions, but, in the final analysis, the decision is yours.

If you want the choice to be YOURS, you must get out and vote on September 10, 1983. Otherwise, the choice will be THEIRS.

The following week there was a further letter to all employees over the signature of Frank Guthier, the senior vice-president of Kraus:

Over the past few days, many employees have come to us with questions about the vote which will be held on Saturday September 10, 1983 when our employees will decide whether to merge the 'Kraus Carpet Employees Association' with the 'United Food and Commercial Workers', an international union. The following are answers to some of the questions that employees might be asking....

9. Attached to Mr. Guthier's letter are a series of questions and answers setting out not only when and where the vote will be held, but also comments about dues, the International affiliation of the UFCW, the independence of the existing organization and so on, which leave no doubt as to the employer's position. Indeed, on the final page of the handout, the company states quite frankly that it is against the merger and urges all employees to get out and vote for what could be "one of the most important decisions of your working career". The employers also called an employee meeting to express these views. The propriety of this employer activity is not an issue before us. An earlier section 89 complaint was settled to the satisfaction of the parties.

10. In response and rebuttal, the union executive members circulated leaflets (again, translated) setting out more reasons why the merger was desirable and contesting the employer's position that the merger would prejudicially affect the employees' freedom of action. There was also a telephone campaign. In addition to all of this, someone, described only as "a concerned employee", posted his own notice to fellow employees, setting out why he planned to vote against affiliation with the UFCW.

11. In the face of all of this activity, it is difficult to conclude that any of the employees could have been in any doubt about the purpose of the meeting, and none of the witnesses who gave evidence suggested that this was the case. Some of the witnesses were in favour of merger and some were not; however, none of the witnesses was under any illusion about the object of the meeting and the vote which was to be conducted. It was a meeting to discuss and vote upon a proposed merger with the UFCW on the terms set out in the letter from the Association's solicitor. That purpose is also reflected in the wording of the question appearing on the ballots (again, translated into three languages) which the members were ultimately given to signify their choice. The ballot reads:

QUESTION

Are you in favour of Kraus Carpet Employees Association becoming a chartered local of the United Food & Commercial Workers Union?

Yes ☐
No ☐

12. The object of the September 10th meeting was clear and straightforward, and the

merits of the employees' decision are not the Board's concern. But we are concerned with whether the steps taken to accomplish that objective were sufficient for the purposes of section 62 of the Act. This, in turn, entails a consideration of the Association's constitution and, for sake of convenience, those sections of the constitution to which reference will subsequently be made will be grouped together here. They are as follows:

ARTICLE 1 – NAME

This organization shall be known as Kraus Carpet Employees Association and is hereinafter referred to as the Association.

ARTICLE 2 – PURPOSE

The purpose of the Association is to establish for the workers and their families a better standard of living by adjusting wages and improving working conditions so as to insure all a full and prosperous life; also to regulate relations between the Company and its employees.

ARTICLE 3 – MEMBERSHIP

All employees employed by Kraus Carpet Mills Ltd. hereinafter referred to as the Company, below the rank of foreman shall be eligible to be a member in good standing of the Association, upon:

- (a) signing an application for membership in the association, and
- (b) payment of the initiation fee of \$1.00.

Any employee shall cease to be a member of the Association:

- (a) upon leaving the employ of the Company, either of his own accord or by dismissal; or
- (b) upon being expelled from the Association by the Association Executive for any reason which the Executive may consider proper.

Any member who has been expelled by the Association Executive shall have the right of appeal to a general meeting of the Association and the decision of the Executive to expel him may be overruled by a two-thirds vote of all members of the Association present and voting at such general meeting.

ARTICLE 12 – AMENDMENTS

This Constitution may be amended only on the approval of a majority of the members of the Executive supported by a majority vote of all the members of the Association.

The constitution does *not* contain any express provision contemplating merger, amalgamation, affiliation, or a transfer of bargaining rights to any other labour organization. However, it does contain Article 12, permitting the constitution to be amended with the approval of a majority of the members of the executive supported by a majority vote of the members of the Association. On the advice of its solicitors, the executive decided that in order to effect a merger with the UFCW there must first be an amendment to the constitution to permit such merger.

13. The proposed constitutional amendment was drafted with the assistance of the Association's solicitors and passed unanimously at an executive meeting held for that purpose on September 10, 1983, shortly before the general membership meeting. The proposed constitutional amendment is set out in the minutes of the executive meeting:

The following motion was made by Rose Kube:

That the Constitution of the Association be amended by adding the following article:

“This Association may be dissolved or it may merge or amalgamate with or transfer its jurisdiction to another trade union if the following conditions are satisfied:

a) the resolution to dissolve, merge, amalgamate or transfer the jurisdiction of the Association, as the case may be, must be approved by a majority vote of the members attending a general or special meeting of the Association;

b) members must be given notice of the meeting by mailing the same to all members of the Association or by posting the same on the bulletin board on all plants, where the Association is the bargaining agent. The notice must advise members that the meeting will vote on the question of a proposed dissolution, merger, amalgamation or transfer of jurisdiction, as the case may be;

c) the terms upon which any dissolution, merger, amalgamation or transfer of jurisdiction is to take place shall be approved by a majority vote of the members voting at a meeting called for that purpose.”

The motion was seconded by Terry Doering. A vote was conducted by a show of hands. The result was:

In favour: 3

Against: 0

14. The various notices and the active debate obviously had the desired effect. Almost 400 of the Association's members came to the meeting. This turn out was unprecedented. Usually, the Association had difficulty getting a quorum. Mr. Steckly testified that the turnout was at least three times larger than any meeting he could recall and, we might note that for some years, he had been a member of the Association's executive. On the other hand, the

efforts to inform employees of the meeting were also unprecedented. Typically, notice of a meeting was merely posted on the employers' premises rather than sent individually to each employee. Moreover, in the past, the posted notices did not usually spell out the purpose of the meeting or the matters which were to be discussed. Nor had the Association ever had a practice of translating notices or other union documents to facilitate the members' understanding of Association business. The language of work was English and the Association had always assumed that notices in English were sufficient.

15. The Association's manner of conducting business has always been very informal. Sometimes, it has not even acted in accordance with its own constitution. Article 3 of that constitution restricts membership in the Association to employees of Kraus Carpets, yet over the years, the Association expanded its membership base and purported to take into membership individuals working for other employer entities (e.g. Waterloo Spinning Mills Ltd.) who, strictly speaking, could not be admitted at all. Nevertheless, those individuals have always been treated as members in good standing with full membership rights – despite the terms of the constitution. No one ever bothered to seek an amendment. Similarly, the evidence before this Board was that the constitution has previously been amended without *any specific* notice to the membership that this was the intended purpose of a meeting. On March 22, 1980, Article 8 of the constitution, concerning the quorum for general meetings, was amended by a show of hands; moreover, unless the Association's membership is five times larger than it was three years ago (which on the evidence does not seem to be the case), those supporting the constitutional amendment, which was subsequently implemented and acted upon, were well short of a majority of all members of the Association – the standard which seems to be required by Article 12 of the constitution. It is apparent that the constitution may not provide a very good indication of the way in which the Association actually operated or the way in which its members actually interacted with one another. It is also apparent that the steps taken to change the constitution this time were much more thorough, detailed, and formal, than anything ever done in the past.

16. The Board heard a considerable amount of evidence from a variety of witnesses about what happened at the meeting. Most of that testimony was consistent and we are satisfied that where there were inconsistencies, it was a result of faulty recollection, or inattention during the meeting. One simply cannot expect untrained witnesses to recall with precision events which happened some months before and which, at the time, no one thought would be legally significant or subjected to the kind of scrutiny associated with a legal proceeding. It is hardly surprising that there are some differences in the witnesses' evidence, even though all of the witnesses were being candid and trying to recall what happened as best they could.

17. The meeting took place in the large ballroom on the second floor of the Waterloo Inn. Access to the room was provided by a single set of doors at one end. At the other end of the room was a podium for the members of the executive, guests, and speakers.

18. Before the meeting began, the union's officials took considerable care to ensure that only members of the Association would be allowed to participate. Tables were set up outside of the doors, manned by union officials from all parts of the employers' operation. These officials were expected to personally identify employee members from their own area. The members were then called forward in groups, and working from the seniority lists, each person was identified and his name checked off. The member was then permitted to enter the hall and take a seat.

19. This screening process took some time and, as a result, the meeting started late. While the meeting was in progress, Steve Garland, the Association's "sargeant-at-arms" and several other officials were stationed near the doors to monitor who was coming in and out – for example, to use the washroom facilities down the hall. It is possible that some stranger could have slipped into the meeting and escaped the notice of these union officials; but it is highly unlikely and there is certainly no evidence of such occurrence.

20. Estimates as to the length of the meeting varied, but most of the witnesses suggested that it lasted between one and a half and two hours. The meeting was opened by the members of the executive who introduced the guests at the head table. These included two officials from the UFCW and two solicitors from the firm retained by the Association to assist and advise them in respect of the merger. The solicitors were also expected to help run the meeting, make explanations as required, and assist in the conduct of a vote on the constitutional amendment and proposed merger.

21. After the president of the Association had called the meeting to order, he turned the meeting over to one of the Association's solicitors who introduced the guests and explained that the members present were to vote on a constitutional amendment to permit merger with the UFCW. She read out the constitutional amendment in its entirety and advised that the members would have an opportunity to vote on the proposal. She outlined the steps taken by the executive to date, the negotiations with the UFCW and the terms of the merger: that the Association would become a separate chartered local of the UFCW, and that it would retain its local autonomy, its own elected executive and stewards, and its own funds. There would be no change in union dues, although a portion would be remitted to the UFCW. For its part, the UFCW had undertaken to provide a variety of organizational and representational services as outlined in her letter. She advised the members that at the end of the debate they would be asked to vote upon whether they agreed with the executive to effect a merger and, if they voted "yes", an application would be made to the Ontario Labour Relations Board for a formal confirmation of the transfer of bargaining rights to a separate local to be chartered by the UFCW. That chartered local would then step into the shoes of the Association to become its successor. Finally, she expressed her own view that the members would have a stronger, more effective and more professional voice by associating with the UFCW.

22. After the solicitor's report to the members, Cliff Evans of the UFCW explained the origins, growth, and present status of the UFCW in a variety of industries in Ontario. He indicated the advantages of association with his union, the expertise and experience it could bring to bear on employee problems, and some of the collective bargaining successes which it had had in the past. Evans' position was supported by two speakers from other local employee associations who had merged with the UFCW in recent years. There followed a variety of speakers from the executive and questions from the floor in which the members canvassed such matters as strikes, the relationship between the various bargaining units, union dues, and generally the "pros" and "cons" of the merger. Where the questions had a legal aspect, the Association's solicitors participated in the discussion. Portions – although not all – of the debate were translated into Portuguese and Serbo-Croatian by two translators who were present for that purpose. Mr. Steckly testified that, as in the past, he assumed that those who had a good command of English would assist those who did not.

23. All of the witnesses (including the objectors) testified that the issues concerning the merger were fully canvassed, and that in light of the discussion at the meeting, the members

knew precisely what they were voting for or against: a merger with the UFCW. However, they may not have made a distinction between voting for the constitutional amendment and the merger itself, since from a practical point of view they were the same thing. The sole purpose of amending the constitution was to permit a merger with the UFCW. That is how the ballot read, and it was not until the hearing before the Labour Relations Board that anyone suggested that there should be two separate votes: one to approve the constitutional amendment and a second to approve a merger with the UFCW pursuant to that amendment. Whatever the technical merits of that argument, that is not how anyone saw it at the time – not even those who opposed the merger and were unhappy when they found themselves in a minority.

24. After the completion of the debate, the members were invited to form into two lines, by company affiliation so that they could cast their ballots. This was done after some initial confusion, as employees drifted to one line or another until both were roughly equal in length. Each line had its own ballot box. The employees filed slowly past a table occupied by one of the solicitors and a union official. Each member was asked whether he wanted a ballot in English, Portuguese, or Serbo-Croatian, and as each ballot was given out a notation was made so that the Association's executive could check the number of ballots issued. But there was no effort at that point to once again verify the identity of the member against the seniority list, as had been done at the start of the meeting.

25. After each employee was given his ballot, he went to a nearby table where he marked his choice. The ballot was then deposited in one of the two ballot boxes which had been borrowed from a local municipality and were secured prior to the commencement of balloting. A union official and one of the solicitors were stationed in the vicinity of each of the ballot boxes to act as a kind of "traffic warden" to keep the lines moving.

26. Once the ballot was cast, the member was expected to leave the room. The evidence establishes that this is what happened. As before, Garland, the sargeant-at-arms, and several others were stationed at the door, to make sure that employees left after casting their ballots and did not return. William Storer testified that he only remained in the room for a few seconds. He wanted to stay but was told to leave. He came back a few minutes later but was told by Garland that he could not enter the room. However, Mato Masic testified that while the line was forming, he and two or three other members went downstairs for a beer, returning a few minutes later to rejoin the line and cast his ballot. The controls on the door obviously were not perfect. On the other hand, Mr. Masic has been employed as a "fixer" for twelve years and is well known throughout the plant because he has occasion to work on the machines in all areas. He was no stranger to those at the door and they would have no reason to believe he was engaged in a scheme to cast extra ballots. In fact, he only voted once.

27. After the voting was completed, the ballots were counted. As in any election, the electoral officer had to make some judgments as to the validity of various ballots and the significance to be accorded to how they were marked. The results were: 249 in favour of merger, 131 against merger, and 6 spoiled ballots. Steve Garland testified that there were fewer ballots cast than individuals identified and checked off when the meeting began, because some of the members left prior to the balloting. However, it is apparent that no one was "stuffing" the ballot box.

28. Mr. Steckly complains that there were insufficient controls placed on the balloting and it was possible that a stranger could have cast a ballot or that someone could have voted twice. But both propositions are extremely unlikely, and there is not the slightest evidence to suggest any impropriety at all. Mr. Steckly's concerns are entirely hypothetical, premised upon the assumption that there was a *possibility* of irregularity and a *possibility* that one of his fellow employees might be motivated to act improperly and exploit the situation. But there is no actual *evidence* to suggest that the vote did not accurately reflect the voluntary wishes of those who cast ballots. We are not prepared on the basis of purely hypothetical possibilities to set aside what, in our view, is a voluntary, accurate, and obviously overwhelming indication of employee support for merger with the UFCW. Nor is the Association's conduct of the vote or subsequent actions based upon it, a breach of its duty of fair representation.

29. Following the meeting, the officials of the Association formally applied to the UFCW for a charter. On September 23, 1983, they received the following letter from the International president of the UFCW:

This letter will serve to inform you that we have received your communication dated September 12, 1983, stating that the membership of the Kraus Carpet Employees Association voted on September 10, 1983, to amend its bylaws/constitution and merge with the United Food and Commercial Workers International Union. We have also received your communication dated September 16, 1983, containing a charter application signed by seven persons whom you identified as employees of Kraus Carpet Mills Limited, associated or related companies and members of the Kraus Carpet Employees Association.

As requested in your letter, this letter will serve to inform you that the United Food and Commercial Workers International Union accepts into membership all of the bargaining unit employees of the Kraus Carpet Mills Limited, and any associated or related companies, who are represented by the Kraus Carpet Employees Association, as members of the United Food and Commercial Workers International Union in good standing under Article 5(A) and they shall enjoy all rights, privileges, duties and obligations as members under the Constitution of the United Food and Commercial Workers International Union.

Would you please convey this message to the membership of the Kraus Carpet Employees Association on my behalf and inform them their charter application has been granted.

At the date of the last hearing in this matter, the evidence was that the purported merger had been completed and a new charter local created encompassing the former members of the Association; however, the actual charter had not yet been received from the union's headquarters in Washington.

III

30. The employers' arguments are two-fold: that the Association cannot merge with another union unless its members *unanimously* authorize such merger; and that even if the Association is capable of merging with another union, the steps taken here are insufficient to accomplish that objective.

31. The employers assert that the Association is a small, independent organization drawing its members exclusively from the ranks of the employees of a select group of companies. Its constitution has no provision for merger or affiliation with other labour organizations, and, in the employers' submission, to add such provision would significantly alter the very essence of the Association and the relationship of its members inter se. It would be a change in the fundamental objects of the organization which, the employers argue, would require the unanimous consent of each and every one of the Association's members. The employers argue that a voluntary association cannot alter its fundamental objects without the unanimous consent of each member potentially affected by such change. Every member has a veto, and here, there were a large number of members opposed to the merger. Reference is made to the majority decision (Laskin, J.A. dissenting) in *Astgen et al. v. Smith and International Union of Mine, Mill and Smelter Workers et al.* (1969), 9 D.L.R. (3d), 69 CLLC ¶14,198 (O.C.A.), where, it is said, the Court found that there was a fundamental distinction between the objects of an international union operating in both Canada and the United States, and a union whose sphere of operations was restricted to Canada.

32. In the alternative, the employers attack the sufficiency of the steps undertaken by the Association to effect a merger with the UFCW (i.e. to transform the Association into a local of the latter union). The employers assert that an amendment to the constitution to permit a merger, and a vote to merge, are two entirely different things. They should not be confused, and cannot be combined. If a merger was to be accomplished, the employers argue that it was necessary first, to amend the constitution to permit such merger, and second, to have a separate vote in favour of merger, in accordance with the amended constitutional provisions. The employer argues that the two steps cannot be taken together – not least, because the requirements for any constitutional amendment, and the steps necessary to satisfy the terms of this particular amendment are different. A constitutional amendment requires a majority vote of all of the members of the Association to approve it; but, having done so, a merger itself can be accomplished by the vote of a majority of members attending a general or special meeting. The employers submit that in a matter as important as this, it was incumbent upon the Association to scrupulously adhere to the proper procedures and to conduct separate votes to amend the constitution and effect a merger, with proper notice and debate on both of these issues. The employers' arguments were adopted and supported by the objectors.

IV

33. At common law (i.e., before the passage of modern labour legislation some forty years ago), a trade union was merely a voluntary association of employees, like a club, acting collectively in pursuit of their common interests and without any statutory framework or underpinnings. Indeed, for a time, trade unions and their activities attracted common law sanctions because such collective action amounted to a civil conspiracy in restraint of trade. However, to determine whether one trade union has acquired the *statutory* rights and obligations of another – that is, to determine the application of section 62 of the Act – one cannot

ignore the statutory framework or forget that unions no longer operate (as they once did) in a legislative vacuum. Trade unions, like clubs, may well be able to exist without direct reference to the *Labour Relations Act*, but the fact is that if a trade union is to do what by statute it must do to preserve its status as a union under the Act, it must conform to statutory norms.

34. A modern trade union is very different from a typical club. It is concerned primarily with the acquisition and exercise of statutory bargaining rights. What club or mere voluntary association has the exclusive statutory right to determine its members' terms and conditions of employment – regardless of what those members might think from time to time? What voluntary association in pursuit of its constitutional objectives has the right to act on behalf of and fundamentally affect the rights of persons who are *not* its members and who may never have voluntarily subscribed to those objectives? What club has a statutory obligation to fairly represent *non-members*, where necessary, expending *membership* funds to do so? What club can compel the payment of membership fees from members and non-members alike? How realistic is it to treat a trade union as a “voluntary” association when the reality is that membership may be made a compulsory condition of employment? In the present case, membership in the Association has been made a condition of employment for a number of employees. The fact is that while at common law a trade union may still be only a voluntary association, under the *Labour Relations Act* it is much more than that, and when considering the acquisition, exercise or transfer of rights rooted in the statute, one cannot ignore either the practical or legal differences. Likewise, in trying to ascertain a union's essential objects (in an *Astgen v Smith* sense) we think the statute provides a guideline – at least in the absence of explicit conditions in the union's own constitution.

35. The *Labour Relations Act* defines “trade union” as “an organization of employees formed for purposes that include the regulation of relations between employees and employers and includes a provincial, national, or international trade union, a certified council of trade unions and a designated or certified employee bargaining agency” (see section 1(1)(p) of the Act). The Act does not distinguish between trade unions on the basis of national or international affiliation. For the purposes of the statute it does not matter. It is not even significant, let alone fundamental. Nor is there any requirement, for example, for internal union democracy (see the decision of the Court of Appeal in *C.S.A.O. National (Inc.) v. Oakville Trafalgar Memorial Hospital Association et al.* (1972), 26 D.L.R. (3d) 63). Again, for the purpose of the statute, it does not matter. What *does* matter is that the organization be composed of employees and have, among its objects, the regulation of relations between employees and employers. That is what defines the “essence” of a trade union under the Act and distinguishes it from athletic clubs, debating societies, ethnic organizations, political parties, or other voluntary associations. It is the collective bargaining purpose that is the critical requirement. Anything else is ancillary or superfluous. Conversely, an organization which does not have as its object collective bargaining, cannot be a trade union capable of acquiring rights or responsibilities under the *Labour Relations Act*.

36. This is not to say, of course, that the constitution of a trade union is irrelevant to the Board. It is obviously an important document and in particular cases or contexts, its terms may be decisive. But it does not have the central role which it plays at common law in resolving disputes among the members over the use or distribution of assets, eligibility for office, the conduct of elections, the pursuit of the organization's objectives, and so on. That is evident from the terms of the statute itself. For example, for some statutory purposes, an individual can be a member of a trade union *regardless* of the eligibility requirements of its

charter, constitution, or bylaws upon merely making application for membership and paying one dollar (see section 1(1)(j)). That is the effect of section 103(4) of the Act, and it is interesting to note that it specifically reverses a Supreme Court of Canada decision to the contrary (see *Metropolitan Life Insurance Co. v. International Union of Operating Engineers, Local 796 et al.* (1970), 11 D.L.R. (3d) 336). Even section 62 does not expressly require that the purported merger, etc. must, or need only be in accordance with the constitution – although that is the interpretation which the Board has generally given it. The provision for taking representation votes suggests that the Board may require additional confirmatory evidence even if all of the constitutional proprieties have been observed. Conversely, it might be argued that a Board supervised vote could cure any constitutional irregularities.

37. We think the starting point in any consideration of the application of section 62 should be the trade union itself: how its objects have actually been framed in its constitution, and how it has actually operated in purported furtherance of those objects. In the absence of compelling evidence, we do not think the Board would be warranted in reading into the constitution either purposes or restrictions which are not there, nor if there is no distinction in the document itself between objects which are “fundamental” and those which are merely ancillary, do we think it appropriate for this Board to second-guess the intentions of the founding members – particularly since, in all likelihood, no one ever really considered the matter, just as no one paid any attention when the Association expanded its membership base beyond those limits which the constitution contemplates. The lack of a merger or affiliation provision is not an indication of some essential but unstated premise about the fundamental nature or destiny of the Association. More likely, it results from a lack of sophistication or simply oversight.

38. We might observe at this point that we do not think anything turns on the fact that the transaction with the UFCW was framed as a merger rather than a transfer of bargaining jurisdiction. Although the merger permits the employers to now claim that the “very existence” of the Association was at stake, that argument is a little artificial. Suppose, for example, that the Association had merely purported to transfer to the UFCW bargaining jurisdiction for the employees it represents, while preserving its separate existence, officers, assets, members, and so on. Would this change in the form of the transaction make any difference? We do not think so. The Association would be a hollow shell, a form without function, an organization with a continued common law existence but unable any longer to bargain with the employer in pursuit of the objective expressly stipulated in its constitution. If a merger is a fundamental change in the nature of the organization, a transfer of jurisdiction must be too.

39. The only objective *expressly* spelled out in the Association’s constitution is the regulation of employer-employee relations. There is nothing dealing with mergers at all, nor with the affiliation of the Association with any other organization. However, there is a procedure for amending the constitution, and there are no express restrictions on the nature of such amendment. The words are broad enough to encompass an amendment to provide for merger and certainly such merger provisions are common enough in other union constitutions that they cannot, in themselves, be considered unusual. If the members had turned their minds to, and considered the terms of their constitution, there is nothing on its face which would suggest that a constitutional amendment to effect a merger was impossible, nor is this even a reasonable inference from the evidence before us. No one claimed or even seems to have considered that what the Association set out to do in its meeting on September 10th, could not

be done at all without unanimous consent, or that Mr. Steckly had but to stand up and say "I object" and that would have been the end of the matter. Certainly there is no indication that any of the witnesses, while differing in their views as to the desirability of a merger, ever suggested or believed that one negative vote was sufficient to frustrate the wishes of the rest of the members. On the contrary, whatever its legal validity, this notion was only raised and elaborated in the employers' argument before this Board. Now, of course, the subjective expectations of the members may not be legally relevant; but when the Board is being asked to read some fundamental but unexpressed limitation into the constitution of an organization, it is at least interesting to note that the notion does not seem to have occurred to any of the members of the organization who gave evidence. And whatever the founding members and framers of the constitution may have thought about the desirability of the later merger, there is no reason to believe that they expected it to be impossible without unanimity.

40. The only significant limit explicit on the face of the constitution is the restriction confining the Association's membership to employees of Kraus, and one might argue that this at least was a fundamental aspect of the organization. But, as we have already noted, the Association regularly took into membership employees of other companies without even bothering to change its constitution. Likewise, the Association purported to amend the quorum requirements of the constitution without even following the apparent requirements for a constitutional amendment. And there is little doubt that if the referendum result had been 444 to 1 in favour of merger, many members would be surprised to learn that the motion had been defeated. Certainly a reading of the constitution would not alert them to that possibility. Yet the employers now demand not only strict constitutional propriety but also an implied common law right of veto by any dissenting member.

41. In collective bargaining terms, the merger with the UFCW would not erase the separate identity of the Association, although counsel for the employers is undoubtedly right when he says that the Association, as such, may cease to exist. It would become a separate local of the UFCW which would continue as the employees' bargaining agent as a separate (albeit subordinate) trade union with the object of representing employees for the purposes of collective bargaining. It would still retain its own officers, its own assets, the right to select its own bargaining committee, and substantial independence with respect to such important decisions as strike votes or ratification votes. There would be no change in the employees' collective agreements until their expiry when new agreements would be negotiated and ratified as before. At the same time, its members would receive a variety of potential advantages, such as access to funds and expertise which would otherwise be unavailable. Whether the members would be better off or not, and whether they would be better able to pursue the objective of collective bargaining, we need not here decide. The point is that the new local of the UFCW – which is, what the Association would become – will continue to pursue essentially the same objects as the Association did, and the employees will continue to have similar rights. Indeed, given the rather loose procedures which the Association has followed in the past – sometimes in derogation of the provisions of the constitution – it may be that as part of the UFCW the former Association members will have an enhanced ability to control the affairs of their local.

42. In summary then, there is nothing in the constitution to prevent a merger. The terms certainly do not forbid it. The only relevant constitutional provision is the one respecting amendments. Neither its terms, nor the Association's past practice, nor the testimony before us, suggest that those words must be limited so as to exclude an amendment to permit the merger or affiliation with another union. There is no evidence that the founding members and

architects of the constitution ever contemplated such restriction. There is nothing in the *Labour Relations Act* to suggest that one should infer or read into a union constitution some unstated but fundamental objects which limit the union's freedom of action – at least in the absence of express constitutional limits. Even where such limits exist they do not necessarily govern the acquisition of statutory rights. We can discern no reason of industrial relations policy why the Association in this case should be saddled with a requirement for unanimity, which its members have not expressly undertaken and which would frustrate the wishes of a significant majority of them. Under the *Labour Relations Act* bargaining rights are acquired or lost or transferred in accordance with the wishes of majorities so there is nothing incongruous in finding that this may have occurred here. Indeed, section 62 itself contemplates the conduct of a representation vote and there is no indication that it would have to be unanimous. Finally, we note that the objects of the new UFCW local which the Association would become are substantially the same as before, and the rights of the Association's members are not substantially different. Accordingly, we are satisfied that for the purpose of section 62 of the Act the union was entitled to amend its constitution in accordance with its terms so as to permit a merger with the UFCW. The remaining question is whether the steps taken were sufficient to effect such merger.

V

43. There is nothing in the Association's constitution requiring any specific form or amount of notice for meetings, whether to deal with constitutional amendments or otherwise, nor is there any implicit requirement arising from the Association's past practices. Indeed, the Association has never before gone to such lengths to advise its members of an upcoming meeting or the issue to be resolved. No previous issue has ever generated such intense debate or produced a turnout of this magnitude. Nor for the reasons already outlined, do we have any doubt that the members knew precisely what they were hoping to achieve by their vote or that the vote to merge with the UFCW reflects the considered opinion of two-thirds of those who cast ballots and more than a majority of the Association's total membership. The only remaining question is whether a merger could only be accomplished by a two-step process, or whether, as the Association purported to do, the two steps could be combined in a single vote.

44. In our view they could. To hold otherwise, would be to take an entirely too technical view of the required conduct of this Association. It is, moreover, a strict view which would be inconsistent with the way that Association business has been conducted in the past and, again, was raised for the first time only in the context of this proceeding, and then only by the employers. At the meeting in September, Mr. Steckly and other individuals who may have opposed the merger, did not demand two votes because, it is apparent, they did not think it was necessary. They knew that the result would be the same. The vote on the constitutional amendment and merger was explained to the members and regarded as a single process, and none of the witnesses who gave evidence before the Board expressed any confusion as to what the vote was really about. They differed with respect to the desirability of a merger, but there was no doubt about their views concerning the purpose or effect of the balloting. Even Mr. Steckly's section 68 complaint did not suggest that there should have been two separate votes. His allegations concerned the possibility for cheating in the one vote held. It was the employer who first suggested that two votes were necessary – an argument which Mr. Steckly then adopted. It may be that it would have been wiser to separate the issue of amending the constitution to permit merger from the issue of the merger itself, but there is nothing in the constitution of the Association which prevents dealing with these two related questions together,

nor the slightest suggestion that if the Association had adopted this course, the result would have been any different.

45. Under section 62 of the *Labour Relations Act*, the Board must assess a *claim* that one trade union is the successor of another by reason of a merger, amalgamation, or transfer of bargaining jurisdiction. The Board must examine the relationship between the two union entities and consider the process by which the successor has allegedly acquired the rights of its predecessor, and, where the Board considers it necessary it can require the production of documentary evidence or seek the further confirmatory evidence of a Board-supervised representation vote. However, we do not think such further evidence is necessary in the circumstances of this case. Having regard to the totality of the evidence adduced before us, we are satisfied that the UFCW has acquired the rights, privileges and obligations under the Act of the predecessor Kraus Carpets Employees Association. Mr. Steckly's section 89 complaint is dismissed.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING FEBRUARY 1984

BARGAINING AGENTS CERTIFIED

No Vote Conducted

0215-83-R: United Brotherhood of Carpenters & Joiners of America, (Applicant) v. 496068 Ontario Ltd. Thorold Lumber & Home Centre, (Respondent).

Unit: "all employees of the respondent in Thorold, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff." (5 employees in unit).

0504-83-R: Carleton Roman Catholic Separate School Board Employees' Association, (Applicant) v. Carleton Roman Catholic Separate School Board, (Respondent) v. The Canadian Union of Public Employees, (Intervener).

Unit: "all employees of the respondent engaged in maintenance, plant operations and transportation in the Regional Municipality of Ottawa-Carleton, save and except administrative supervisor, persons above the rank of administrative supervisor, office and clerical staff, students employed during the school vacation period and students employed on work experience programmes." (200 employees in unit). (*Having regard to the foregoing and to the agreement of the parties*). (*Clarity Note*).

0572-83-R: Ontario Nurses' Association, (Applicant) v. Victorian Order of Nurses, Lakehead Branch, (Respondent).

Unit: "All registered and graduate nurses employed in a nursing capacity by the respondent in the City of Thunder Bay, save and except assistant nursing supervisor, nursing supervisor, and persons above the rank of nursing supervisor." (37 employees in unit).

1048-83-R: Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, (Applicant) v. Thames Valley Beverages Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent working at and out of London, Ontario, save and except foremen, sales supervisors, those above the rank of foreman and sales supervisor, office staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (69 employees in unit).

2162-83-R: The Canadian Union of Public Employees, (Applicant) v. York Lea Children's Lodges Incorporated, (Respondent).

Unit: "all employees of the respondent at 67 Everett Crescent, 207 Roxton Road, 49 Chapman Avenue and 51 Chapman Avenue in Metropolitan Toronto, regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except assistant superintendents, house supervisors, those above the rank of assistant superintendent and house supervisors and persons covered by subsisting collective agreements." (26 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

2344-83-R: International Union United Plant Guard Workers of America, Local 1962, (Applicant) v. American Motors (Canada) Inc., (Respondent) v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (U.A.W.), (Intervener) v. Employee, (Objector).

Unit: "all security officers employed by the respondent in the City of Brampton, save and except senior security officer, persons above the rank of senior security officer, and persons covered by a subsisting collective agreement." (14 employees in unit). (*Having regard to the agreement of the parties*).

2346-83-R: Labourer's International Union of North America, Local 183, (Applicant) v. 470187 Ontario Limited known as "Kennedy Apartments", (Respondent).

Unit: "all employees of the respondent employed at 33 Kennedy Road, South, Brampton, Ontario, including resident superintendent, save and except property manager." (2 employees in unit).

2347-83-R: International Union of Allied, Novelty and Production Workers, Local 905, (Applicant) v. Insulgard Pad, (Respondent).

Unit: "all employees of the respondent in Toronto, save and except foremen, persons above the rank of foreman, office and sales staff." (7 employees in unit). (*Having regard to the agreement of the parties*).

2358-83-R: Windsor Newspaper Guild, Local 239, The Newspaper Guild, CLC, AFL-CIO, (Applicant) v. The Windsor Star, A Division of Southam Inc., (Respondent).

Unit #1: "all employees of the respondent employed in the Circulation Department in the Province of Ontario, save and except Circulation Manager, Assistant Circulation Manager, Clerical Supervisor, Circulation Supervisor, Secretary to the Circulation Manager, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (28 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all employees of the respondent employed in the Circulation Department in the Province of Ontario who are regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except Circulation Manager, Assistant Circulation Manager, Clerical Supervisor, Circulation Supervisor and Secretary to the Circulation Manager." (3 employees in unit). (*Having regard to the agreement of the parties*).

2359-83-R: Retail, Wholesale and Department Store Union, AFL, CIO, CLC, (Applicant) v. 527713 Ontario Limited, carrying on business as Macdonald Beverages, (Respondent).

Unit: "all employees of the respondent at and out of Sudbury, Ontario, save and except foremen or sales representatives, persons above the rank of foreman or sales representative, office and clerical staff, and persons regularly employed for not more than 24 hours per week." (3 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

2362-83-R: Ontario Public Service Employees Union, (Applicant) v. Kapuskasing and District Children's Aid Society, (Respondent).

Unit: "all employees of the respondent in the District of North Cochrane, Ontario, save and except supervisors, persons above the rank of supervisor, executive secretary, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (41 employees in unit). (*Having regard to the agreement of the parties*).

2363-83-R: Canadian Union of Public Employees, (Applicant) v. The Milton Public Library Board, (Respondent).

Unit: "all employees of the respondent in Milton, Ontario, save and except supervisors and persons above the rank of supervisor, Chief Librarian and Secretary Treasurer to the Library Board, Secretary/Bookkeeper to the Chief Librarian and persons covered by certificates issued under Board File Number 0461-83-R." (12 employees in unit). (*Having regard to the agreement of the parties*).

2376-83-R: Teamsters Local Union No. 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. O. Browne & Co. Ltd., (Respondent).

Unit: "all employees of the respondent at Markham, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, those persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (17 employees in unit). (*Having regard to the agreement of the parties*).

2386-83-R: Canadian Paperworkers Union, (Applicant) v. K.D.F. Industries Limited, (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (11 employees in unit). (*Having regard to the agreement of the parties*).

2390-83-R: Canadian Union of Public Employees, (Applicant) v. Corporation of the Township of Matilda, (Respondent).

Unit: "all employees of the respondent in the Township of Matilda, save and except superintendents, persons above the rank of superintendent, office, clerical and technical staff." (4 employees in unit). (*Having regard to the agreement of the parties*).

2391-83-R: United Brotherhood of Carpenters and Joiners of America, Local 2041, (Applicant) v. A & G Dangelo Drywall Ltd., (Respondent).

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

2394-83-R: International Brotherhood of Painters and Allied Trades – Local 1891, (Applicant) v. Lemaco Painting Company, (Respondent).

Unit #1: "all painters and painters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

Unit #2: "all painters and painters' apprentices in the employ of the respondent in the Municipality of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

2397-83-R: International Union of Allied Novelty and Production Workers, Local 905, (Applicant) v. Fern Brand Waxes Limited, (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except supervisors and foremen, persons above the rank of supervisor and foreman, office, sales, and clerical staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (32 employees in unit). (*Having regard to the agreement of the parties*).

2400-83-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (U.A.W.), (Applicant) v. VentureTrans Manufacturing Inc., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Millhaven, Ontario, save and except foremen, persons above the rank of foreman, manufacturing engineers, planners, industrial engineers, office and clerical staff." (198 employees in unit).

2401-83-R: Labourers' International Union of North America Local 527, (Applicant) v. Modern Building Cleaning, a division of Dustbane Enterprises Limited, (Respondent).

Unit: "all employees of the respondent at the Chateau Laurier in Ottawa, Ontario, save and except foremen and foreladies, those above the rank of foreman and forelady, office, clerical, and sales staff." (10 employees in unit). (*Having regard to the agreement of the parties*).

2432-83-R: Local Union 636 of the International Brotherhood of Electrical Workers, (Applicant) v. The Metropolitan General Hospital, (Respondent).

Unit: "all office and clerical employees of the respondent in Windsor, Ontario, regularly employed for not more than twenty-four (24) hours per week save and except:

(a)
the Executive Director, Associate Executive Director, Director of Finance, Assistant Executive Director-Patient Care, Director of Human Resources and Labour Relations, Purchasing Manager, Assistant Purchasing Agent, Business Office Manager, Environmental Control Officer, Chief Medical Record Librarian, Social Workers, Fund Raising Chairman, Registered Nurses engaged in a nursing or technical capacity, and

(b)
the Secretary to the Executive Director, the Secretary to the Associate Executive Director, the Secretary to the Director of Finance, the Secretary to the Assistant Executive Director-Patient Care, and the Secretaries to the Director of Human Resources and Labour Relations and

(c)
students employed during the school vacation period or on a co-operative work study program and

(d)
all other employees covered by subsisting Collective Agreements." (68 employees in unit). (*Having regard to the agreement of the parties*).

2435-83-R: United Steelworkers of America, (Applicant) v. Jensen Steel Limited, (Respondent).

Unit: "all employees of the respondent in the town of Newcastle, save and except foremen, persons above the rank of foreman, office and sales staff, and students employed during the school vacation period." (16 employees in unit). (*Having regard to the agreement of the parties*).

2446-83-R: Triple A Union of Drivers and General Workers, (Applicant) v. Transwares Management Ltd., (Respondent).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff, brokers and owner operators." (44 employees in unit). (*Having regard to the agreement of the parties*).

2448-83-R: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local Union 704, (Applicant) v. Trades Incorporated, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Windsor, Ontario, save and except office staff, and persons above the rank of foreman." (5 employees in unit).

2462-83-R: United Steelworkers of America, (Applicant) v. Westfalia Industries Inc. (Respondent).

Unit: "all employees of the respondent in the Township of Vaughn, save and except foremen and those above the rank of foreman, office and sales staff." (19 employees in unit). (*Having regard to the agreement of the parties*).

2471-83-R: United Food and Commercial Workers International Union AFL, CIO, CLC, (Applicant) v. Nabisco Brands Ltd., Planters Division, (Respondent).

Unit: "all employees in the Quality Control Lab of Nabisco Brands Ltd. at 672 Dupont Street, Toronto, Ontario, save and except Technical Specialist, Supervisor, persons above the rank of Supervisor, persons regularly employed for not more than twenty-four hours per week and students employed during the summer vacation period." (5 employees in unit). (*Having regard to the agreement of the parties*).

2475-83-R: International Ladies' Garment Workers' Union, (Applicant) v. Duke of Windsor Sports, (Respondent).

Unit #1: "all employees of the respondent in Windsor, Ontario, save and except forepersons, persons above the rank of foreperson, office and sales staff, designers, mechanics, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (5 employees in unit). (*Having regard to the agreement of the parties*).

2480-83-R: Labourers' International Union of North America, Local 183, (Applicant) v. F.C.M. Construction Limited, (Respondent).

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in unit).

Unit #2: "all construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in unit).

2481-83-R: International Union of Operating Engineers, Local 793, (Applicant) v. F.C.M. Construction Limited, (Respondent).

Unit #1: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

Unit #2: "all employees of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

2490-83-R: Retail Clerks Union Local 1977, chartered by the United Food & Commercial Workers International Union, AFL, CIO, CLC, (Applicant) v. Zehrs Markets, A Division of Zehrmart Limited, (Respondent).

Unit: "all employees of the respondent at its retail store in Ingersoll, Ontario, save and except the store manager and persons above the rank of store manager." (42 employees in unit). (*Having regard to the agreement of the parties*).

2509-83-R: United Brotherhood of Carpenters and Joiners of America, Local 93, (Applicant) v. 519485 Ontario Ltd., (Respondent).

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in unit).

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in unit).

2519-83-R: United Steelworkers of America, (Applicant) v. Nelson Quarry Company, (Respondent) v. Energy and Chemical Workers Union, C.L.C., (Intervener).

Unit: "all dependent contractors working at or out of the respondent's quarry at Burlington, Ontario, save and except foremen and persons above the rank of foreman, dispatcher, office and sales staff, security guards and watchmen, and persons covered by the certification in Board File No. 2273-83-R." (27 employees in unit). (*Having regard to the agreement of the parties*).

2520-83-R: Retail, Wholesale and Department Store Union, AFL, CIO, CLC, (Applicant) v. Whakatane Holdings Limited, (Respondent).

Unit: "all employees of the respondent at Stoney Creek, Ontario, save and except foremen, those above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (10 employees in unit). (*Having regard to the agreement of the parties*).

2523-83-R: International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, (U.A.W.), (Applicant) v. Judricks Enterprises Ltd., (Respondent).

Unit: "all employees of the respondent in the City of Windsor, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (33 employees in unit). (*Having regard to the agreement of the parties*).

2535-83-R: United Food and Commercial Workers International Union, Canadian Labour Congress, AFL-CIO, (Applicant) v. The Prince Edward County Board of Education, (Respondent).

Unit #1: "all office and clerical employees of the respondent in Prince Edward County save and except the superintendent of business, persons above the rank of superintendent of business, executive secretaries to the superintendents and director of education, the senior accounting clerks and persons covered by subsisting collective agreements." (25 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Unit #2: "all classroom aides and lay assistants of the respondent in Prince Edward County, save and except superintendent of business, persons above the rank of superintendent of business and persons

covered by subsisting collective agreements.” (19 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

2538-83-R: Local 47 Sheet Metal Workers’ International Association, (Applicant) v. Mechanical Tinsmith, (Respondent).

Unit: “all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (3 employees in unit).

2539-83-R: United Rubber, Cork, Linoleum and Plastic Workers of America, AFL, CIO, CLC, (Applicant) v. Canway Paper Products Limited, (Respondent).

Unit: “all employees of the respondent in Kingston, Ontario, save and except foremen, those above the rank of foreman, office and sales staff and persons regularly employed for not more than 24 hours per week.” (4 employees in unit). (*Having regard to the agreement of the parties*).

2540-83-R: United Brotherhood of Carpenters and Joiners of America, Local 2041, (Applicant) v. Norben Interior Design, (Respondent).

Unit #1: “all carpenters and carpenters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (3 employees in unit).

Unit #2: “all carpenters and carpenters’ apprentices in the employ of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (3 employees in unit).

2541-83-R: United Brotherhood of Carpenters and Joiners of America, Local Union 1669, (Applicant) v. The Panache, (Respondent).

Unit #1: all carpenters and carpenters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in unit).

Unit #2: “all carpenters and carpenters’ apprentices in the employ of the respondent in the District of Kenora, including the Patricia portion, but excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in unit).

2566-83-R: International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local No. B173, (Applicant) v. The O’Keefe Centre For The Performing Arts, (Respondent).

Unit: “all employees of the respondent employed in the City of Toronto, save and except department heads or managers and those above the rank of department head or managers, office and clerical staff and employees covered by subsisting collective agreements.” (90 employees in unit). (*Having regard to the agreement of the parties*).

2582-83-R: Service Employees Union, Local 478, (Applicant) v. Kapuskasing & District Association for the Mentally Retarded, (Respondent).

Unit: "all employees of the respondent in Kapuskasing, Ontario, save and except managers, those above the rank of manager, office staff, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period or in a co-operative training program, and persons covered by subsisting collective agreements." (7 employees in unit). (*Having regard to the agreement of the parties*).

2604-83-R: The United Brotherhood of Carpenters and Joiners of America, Local 1030, (Applicant) v. Dashwood Industries Limited, (Respondent) v. Group of Employees, (Respondent).

Unit: "all employees of the respondent employed in Kanata, Ontario, save and except office and sales staff, foremen and persons above the rank of foreman." (12 employees in unit). (*Having regard to the agreement of the parties*).

2646-83-R: International Union of Operating Engineers, Local 793, (Applicant) v. Pile Foundations ('79) Ltd., (Respondent).

Unit #1: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

Unit #2: "all employees of the respondent in the District of Rainy River, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

2273-83-R: Energy and Chemical Workers Union, C.L.C., (Applicant) v. Nelson Quarry Company, (Respondent) v. United Cement, Lime, Gypsum and Allied Workers International Union, AFL, CIO, CLC, (Intervener).

Unit: "all employees of the respondent at Burlington, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, dispatchers, watchmen, security guards, dependent contractors, and persons covered by subsisting collective agreements." (39 employees in unit).

Number of names of persons on revised voters' list		43
Number of persons who cast ballots	37	
Ballots segregated and not counted		1
Number of ballots marked in favour of applicant		24
Number of ballots marked in favour of intervener		12

2324-83-R: Service Employees Union, Local 204, affiliated with S.E.I.U., A.F.L., C.I.O., C.L.C., (Applicant) v. Orillia Soldiers' Memorial Hospital, (Respondent).

Unit: "all employees of the respondent in the City of Orillia regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except registered nurses, graduate nurses, undergraduate nurses, paramedical employees, office and clerical employees, supervisors, persons above the rank of supervisor, and persons covered by subsisting collective agreements." (43 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		42
Number of persons who cast ballots	11	
Number of ballots marked in favour of applicant		9
Number of ballots marked against applicant		2

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

2230-83-R: Syndicat Quebecois de l'Imprimerie et des Communications Local 145, (Applicant) v. Group UniMedia Inc. Division Le Droit and Syndicat Quebecois de l'Imprimerie et des Communications Local 102, (Respondents).

Unit: "all employees of the commercial printing plant of the respondent company, in the City of Ottawa, in the regional municipality of Ottawa-Carleton, and Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman, salesmen, security guards and those persons covered by another certificate." (63 employees in unit). (*Having regard to the agreement of the parties*).

Number of persons on voters' list	63
Number of persons who cast ballots	46
Number of ballots marked in favour of Local 145	24
Number of ballots marked in favour of Local 102	22

2231-83-R: Syndicat Quebecois de l'Imprimerie et des Communications Local 145, (Applicant) v. Groupe UniMedia Inc. Division Le Droit and Syndicat Quebecois de l'Imprimerie et des Communications Local 102, (Respondents) v. The Canadian Union of Public Employees, (Intervener).

Unit: "all employees of the respondent company at Ottawa employed in its newspaper plant, save and except assistant foremen, those persons above the rank of assistant foremen, and persons covered by another certificate." (114 employees in unit). (*Having regard to the agreement of the parties*).

Number of persons on voters' list	115
Number of persons who cast ballots	93
Number of ballots marked in favour of Local 145	71
Number of ballots marked in favour of Local 102	21
Number of segregated ballots	1

2232-83-R: Syndicat Quebecois de l'Imprimerie et des Communications Local 145, (Applicant) v. Groupe UniMedia Inc. Division Le Droit and Syndicat Quebecois de l'Imprimerie et des Communications Local 102, (Respondent) v. The Canadian Union of Public Employees, (Intervener).

Unit: "all employees of the respondent company at Ottawa, save and except assistant department manager, assistant pay clerks, assistant personnel director, secretary to the personnel director, secretary to the general manager, the executive secretary to the director of the commercial printing department, persons above the rank of assistant department manager, assistant pay clerk and assistant personnel director, salesmen and those persons covered by another certificate." (85 employees in unit). (*Having regard to the agreement of the parties*).

Number of persons on voters' list	85
Number of persons who cast ballots	72
Number of ballots marked in favour of Local 145	72
Number of ballots marked in favour of Local 102	0

2370-83-R: Labourers' International Union of North America, Local 506, (Applicant) v. Panex Show Services Ltd., (Respondent) v. Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America, (Intervener).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and clerical staff and persons covered by subsisting collective agreements." (7 employees in unit).

Number of names of persons on revised voters' list		7
Number of persons who cast ballots	7	
Number of ballots marked in favour of applicant		2
Number of ballots marked in favour of intervener		5

Applications for Certification Dismissed – No Vote Conducted

2160-83-R: The Night School Teachers Association of the Ottawa Board of Education, (Applicant) v. The Ottawa Board of Education, (Respondent) v. L'Association des Enseignants Franco-Ontariens Ontario Secondary School Teachers' Federation and its District 26, (Intervener #1) v. L'Association des Enseignants Franco-Ontariens, (Intervener #2). (63 employees in unit).

2507-83-R: D. & T. Association of Employees, (Applicant) v. Bartlett Transport Ltd., (Respondent). (16 employees in unit).

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

1238-83-R: International Association of Bridge, Structural and Ornamental Ironworkers, Local Union No. 834, (Applicant) v. Frankel Steel Limited, (Respondent) v. United Steelworkers of America, (Intervener).

Unit: "all employees of the respondent at Milton, save and except foremen, persons above the rank of foreman, office and clerical employees, watchmen, and guards." (280 employees in unit).

Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

2074-83-R: Canadian Paperworkers Union, (Applicant) v. Pearce Containers Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at Mississauga, Ontario save and except foremen, persons above the rank of foreman, office and sales staff." (18 employees in unit).

Number of names of persons on revised voters' list		19
Number of persons who cast ballots	18	
Number of ballots marked in favour of applicant		4
Number of ballots marked against applicant		14

2330-83-R: Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, (Applicant) v. Coca-Cola Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all office employees of the Canning Division of Coca-Cola Ltd. at 24 Fenmar Drive, Weston, Ontario, save and except office manager, confidential secretary to the general manager, foremen and sales supervisors." (7 employees in unit).

Number of names of persons on revised voters' list		4
Number of persons who cast ballots	4	
Number of ballots marked in favour of applicant		0
Number of ballots marked against applicant		4

APPLICATIONS FOR CERTIFICATION WITHDRAWN

0848-83-R: Labourers' International Union of North America, Ontario Provincial District Council, (Applicant) v. Lakeland Pipelines Limited, (Respondent) v. Christian Labour Association of Canada, (Intervener).

2161-83-R: Sheet Metal Workers' International Association Local Union 537, (Applicant) v. Harm Schilthuis and Sons Limited, (Respondent) v. Construction Workers Local 6, affiliated with the Christian Labour Association of Canada, (Intervener).

2288-83-R: United Brotherhood of Carpenters & Joiners of America, Local 1256, (Applicant) v. Cecco Supply Limited, (Respondent).

2398-83-R; 2399-83-R: Service Employees International Union, (Applicant) v. C.N.I.B. Caterplan Services, (Respondent).

2404-83-R: United Brotherhood of Carpenters and Joiners of America, Local Union, 1669, (Applicant) v. Pile Foundations ('79) Ltd., (Respondent).

2464-83-R: The Alliance Employees Union, (Applicant) v. PSAC Holdings Limited, (Respondent).

2488-83-R: Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, (Applicant) v. Pepsi Cola Canada Limited Metropolitan Toronto, (Respondent).

2489-83-R: Labourers' International Union of North America, Local 1059, (Applicant) v. C.D.C. Concrete Forming Limited, (Respondent).

2498-83-R: Service Employees International Union, (Applicant) v. Empire Maintenance Industries, (Respondent).

2496-83-R: Service Employees International Union, (Applicant) v. Domus Building Cleaning Co. Ltd., (Respondent).

2601-83-R: Labourers' International Union of North America, Local 183, (Applicant) v. 573766 Ontario Limited, (Respondent).

2611-83-R; 2612-83-R; 2613-83-R: Retail, Wholesale and Department Store Union, AFL, CIO, CLC, (Applicant) v. Standard Auto Glass, (Respondent).

2632-83-R: International Union of Operating Engineers, Local 796, (Applicant) v. Ottawa Y.M.Y.W.C.A. (Respondent).

2633-83-R: International Union of Operating Engineers, Local 796, (Applicant) v. A. E. LePage Company Limited, (Respondent).

2673-83-R: Labourers' International Union of North America, Local 527, (Applicant) v. The Prince of Wales Complex, (Respondent).

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

1870-83-R: Labourers' International Union of North America, Local 527, (Applicant) v. Campeau Corporation and Famcorp Developments Limited, (Respondent). (*Withdrawn*).

1933-83-R: International Brotherhood of Boilermakers' Local Union 128, (Applicant) v. Tri-Con Mechanical (Sarnia) Limited and Tri-Con Mechanical Holdings Ltd., (Respondents). (*Granted*).

2334-83-R: International Association of Bridge, Structural and Ornamental Ironworkers, Local 700, (Applicant) v. Tri-Con Mechanical (Sarnia) Limited and Tri-Con Mechanical Holdings Limited, (Respondent). (*Granted*).

2460-83-R: United Brotherhood of Carpenters and Joiners of America, Local 1256, (Applicant) v. Edwards Power Door (Canada) Limited and Cecco Supply Limited, (Respondent). (*Withdrawn*).

SALE OF A BUSINESS

1867-83-R: Retail, Wholesale and Department Store Union, Local 414, (Applicant) v. Queensway Foods Ltd., (Respondent) v. Group of Employees, (Objectors). (*Dismissed*).

1870-83-R: Labourers' International Union of North America, Local 527, (Applicant) v. Campeau Corporation and Famcorp Developments Limited, (Respondent). (*Withdrawn*).

1932-83-R: International Brotherhood of Boilermakers' Local Union 128, (Applicant) v. Tri-Con Mechanical (Sarnia) Limited and Tri-Con Mechanical Holdings Ltd., (Respondents). (*Granted*).

2333-83-R: International Association of Bridge, Structural and Ornamental Ironworkers, Local 700, (Applicant) v. Tri-Con Mechanical Holdings Limited, (Respondent). (*Dismissed*).

2432-83-R: Hotel Employees Restaurant Employees Union, Local 75, (Applicant) v. 510412 Ontario Inc., (Respondent). (*Granted*).

2615-83-R: Bright Cheese House a Division of 292806 Ontario Ltd., Woodstock, Ontario, (Applicant) v. Retail Wholesale & Department Store Union Local 440, London, Ontario, (Respondent). (*Withdrawn*).

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

2090-83-R: Harold Times, (Applicant) v. International Woodworkers of America, (Respondent) v. Laurentian Wood Inc., (Intervener).

Unit: "all employees of Laurentian Wood Inc. in the Township of Pickering, Province of Ontario, save and except foremen, persons above the rank of foreman, office and sales staff and persons regularly employed for not more than twenty-four (24) hours per week." (*Granted*).

Number of names of persons on revised voters' list		3
Number of persons who cast ballots	3	
Number of ballots marked in favour of respondent		0
Number of ballots marked against respondent		3

2110-83-R: Rene Poisson, (Applicant) v. Millworkers Local 802 - United Brotherhood of Carpenters and Joiners of America, (Respondent).

Unit: "all employees of Martindale Windows Inc., at Belle River, Ontario save and except foremen, office and sales staff, janitors and students employed during the school vacation period." (3 employees in unit). (*Granted*).

Number of names of persons on list as originally prepared		3
Number of persons who cast ballots	3	
Number of spoiled ballots		0
Number of ballots marked in favour of respondent		0
Number of ballots marked against respondent		3

2268-83-R: Olga Vasquez and Bargaining Unit of Employees of Royal Leather Goods Company, (Applicants) v. Fur, Leather, Shoe and Allied Workers' Union, (Respondent) v. Royal Leather Goods Limited, (Intervener).

Unit: "all employees of Royal Leather Goods Limited at its plant in Metropolitan Toronto, save and except, foremen, foreladies and supervisors, persons above the rank of foreman, forelady or supervisor, shippers, receivers, drivers, office and clerical staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period". (87 employees in unit). (*Granted*).

Number of names of persons on revised voters' list		85
Number of persons who cast ballots	78	
Number of spoiled ballots		4
Number of ballots marked in favour of respondent		19
Number of ballots marked against respondent		55

2340-83-R: The Employees of J.S.H. Mueller Limited, (Applicant) v. International Brotherhood of Electrical Workers, Local 594, (Respondent). (3 employees in unit). (*Withdrawn*).

2682-83-R: Gerald Dobbin, (Applicant) v. United Steel Workers of America, (Respondent) v. Clarke roller & Rubber Ltd., (Employer). (12 employees in unit). (*Dismissed*).

2712-83-R: Hespeler Concrete Floors Limited, (Applicant) v. Labourers' Local 1081, International Brotherhood of Labourers, (Respondent). (3 employees in unit). (*Dismissed*).

APPLICATION FOR DECLARATION OF UNLAWFUL STRIKE

2597-83-U; 2598-83-U: Diesel Division, General Motors of Canada Limited, (Applicant) v. United Automobile Aerospace Agricultural Implement Workers of America (UAW), Local 27, D. Albrechtas, R. Swanson, B. E. Buckley, et al, (Respondents). (*Withdrawn*).

COMPLAINTS OF UNFAIR LABOUR PRACTICE

2367-80-U: The International Association of Bridge, Structural and Ornamental Ironworkers District Council of Ontario; The International Association of Bridge, Structural and Ornamental Ironworkers Locals 721, 736, 759, 765 and 786; The Rodmen Employee Bargaining Agency, consisting of the aforementioned trade unions; Kenneth Childs, Allan MacIsaac, John Donaldson, Larry Bailey, Gordon Verdecchia and Don Melvin on their own behalf and on behalf of each and every member of the aforementioned trade unions, (Complainants) v. The International Association of Bridge, Structural and Ornamental Ironworkers, Norman Wilson, Ontario Hydro and the Electrical Power Systems Construction Association, (Respondents). (*Dismissed*).

0125-83-U: Leo McMullen, (Complainant) v. Canadian Union of Public Employees, C.L.C., Ontario Hydro Employees Union Local 1000, (Respondent) v. Ontario Hydro, (Intervener). (*Dismissed*).

0242-83-U: Renee Guerin, Alexis Lessard, Micheline Larocque, Denis Myre, Marie Belanger, et al, (Complainants) v. Canadian Union of Public Employees, Local 1967, Canadian Union of Public Employees, Local 2474, and The Hawkesbury & District General Hospital, (Respondents) v. Canadian Union of Public Employees, (Intervener) v. Nicole Drouin and certain other employees, (Intervenors). (*Granted*).

0745-83-U: Carleton Roman Catholic Separate School Board Employees' Association, (Complainant) v. Carleton Roman Catholic Separate School Board, (Respondent). (*Dismissed*).

0768-83-U: J. L. Livitski, (Complainant) v. Service Employees' Union, Local 268, (AFL, CIO, CLC.), and Larry O'Brien, President Thereof, (Respondents) v. The Corporation of the City of Thunder Bay, (Intervener). (*Dismissed*).

0791-83-U: Sam Yeum, (Complainant) v. Canadian Union of Public Employees – C.L.C., Ontario Hydro Employees' Union, Local 1000, (Respondent). (*Dismissed*).

0792-83-U: Victor Rosemay, (Complainant) v. Canadian Union of Public Employees – C.L.C., Ontario Hydro Employees' Union, Local 1000, (Respondent). (*Dismissed*).

0793-83-U: Sante Nazzarelli, (Complainant) v. Canadian Union of Public Employees – C.L.C., Ontario Hydro Employees' Union, Local 1000, (Respondent). (*Dismissed*).

0794-83-U: Edward Jantos, (Complainant) v. Canadian Union of Public Employees – C.L.C., Ontario Hydro Employees' Union, Local 1000, (Respondent). (*Dismissed*).

0795-83-U: Renato D'Alessandro, (Complainant) v. Canadian Union of Public Employees – C.L.C., Ontario Hydro Employees' Union, Local 1000, (Respondent). (*Dismissed*).

0796-83-U: Angelo Carmirtrau, (Complainant) v. Canadian Union of Public Employees – C.L.C., Ontario Hydro Employees' Union, Local 1000, (Respondent). (*Dismissed*).

0830-83-U: Lakeland Pipelines Limited, (Complainant) v. International Union of Operating Engineers Local 793, Labourers International Union of North America Local 493, Labourers International Union of North America Local 183, Labourers International Union of North America, Local 597, Richard Kennedy, David Henry, Tom Connelly, Bill Fairservice, Ed Cook, Irwin Longstaff and Mike Ross, (Respondents). (*Withdrawn*).

0850-83-U: Canadian Union of Operating Engineers and General Workers, Local 101, (Complainant) v. Corporation of the Town of Durham, (Respondent). (*Withdrawn*).

0991-83-U: Carleton Roman Catholic Separate School Board Employees' Association, (Complainant) v. Carleton Roman Catholic separate School Board, (Respondent). (*Dismissed*).

1307-83-U: Borg Westermann, (Complainant) v. Canadian Union of Public Employees, Local 1692, (Respondent) v. North York General Hospital, (Intervener). (*Dismissed*).

1382-83-U: United Rubber, Cork, Linoleum and Plastic Workers' of America, Local Union 536, (Complainant) v. General Tire Canada Limited, (Respondent). (*Withdrawn*).

1640-83-U: William Geddes, (Complainant) v. Canadian Union of Public Employees – C.L.C., Ontario Hydro Employees' Union, Local 1000, O.H.E.U., (Respondent). (*Dismissed*).

1713-83-U: Stanley Gray, (Complainant) v. L. J. Bergie, (Respondent). (*Dismissed*).

1781-83-U: Communications Workers of Canada, (Complainant) v. Consolidated Computer Incorporated, (Respondent). (*Withdrawn*).

1860-83-U: Graphic Arts International Union, Local 517, (Complainant) v. Sumner Press, (Respondent) v. Becky La Mantia and Mary Moore, (Intervener). (*Dismissed*).

1882-83-U: Evagelia Tzaneteas, Margarita Tsetsekas, Neva Subatin, Helen Radounisliis, (Complainants) v. Fur, Leather, Shoe and Allied Workers' Union, Local 68, (Respondent). (*Dismissed*).

1916-83-U: Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. Goodhost Foods Limited, (Respondent). (*Withdrawn*).

1931-83-U: International Brotherhood of Boilermakers' Local Union 128, (Complainant) v. Tri-Con Mechanical (Sarnia) Limited and Tri-Con Mechanical Holdings Ltd., (Respondents). (*Withdrawn*).

1974-83-U: Canadian Paperworkers Union, (Complainant) v. Pearce Containers Limited, (Respondent). (*Withdrawn*).

1987-83-U: The Ontario Public Service Employees Union, (Complainant) v. The Children's Aid Society of Ottawa-Carleton, (Respondent). (*Granted*).

1997-83-U: Service Employees' Union, Local 210, (Complainant) v. St. Andrew's Residence, Chatham, (Respondent). (*Withdrawn*).

2117-83-U: Retail, Wholesale and Department Store Union, AFL, CIO, CLC, (Complainant) v. Highland Farms, (Respondent). (*Withdrawn*).

2228-83-U: Harinder Jit, (Complainant) v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (U.A.W.), (Respondent). (*Dismissed*).

2242-83-U: William Kilger, (Complainant) v. Amalgamated Clothing and Textile Workers Union AFL, CIO, CLC, Local 779, (Respondent). (*Withdrawn*).

2252-83-U: Katheryn Dafos, (Complainant) v. United Food Workers, Local 1000A, (Respondent). (*Withdrawn*).

2282-83-U: Abdul Chafchak, (Complainant) v. United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W. and its Local 195, (Respondent) v. Central Stampings Limited, (Intervener). (*Granted*).

2290-83-U: The Canadian Union of Public Employees and its Local 2721, (Complainant) v. Yorklea Childrens Lodges Inc., (Respondent). (*Withdrawn*).

2305-83-U: R.W.D.S.U. AFL, CIO, CLC, (Complainant) v. Canadian Union of Operating Engineers and General Workers, Local 222 and its President, Grant Hartley, (Respondents). (*Withdrawn*).

2319-83-U: David S. Fraser, (Complainant) v. Teamsters Local 647 & Neilson Dairy, (Respondent). (*Withdrawn*).

2355-83-U: Ontario Nurses' Association, (Complainant) v. Children's Hospital of Eastern Ontario, (Respondent). (*Withdrawn*).

2356-83-U: William Chrystal Kennedy, (Complainant) v. Local 1967, U.A.W., (Respondent). (*Withdrawn*).

2371-83-U: Hotels, Clubs, Restaurants & Tavern Employees' Union, Local 261, (Complainant) v. The Windsor House Tavern and Sam Birnbaum, (Respondent). (*Withdrawn*).

2384-83-U: Donald Ross Moulton, (Complainant) v. Local 368, United Cement, Gypsum & Lime Workers, (Respondent). (*Withdrawn*).

2389-83-U: United Food and Commercial Workers International Union, (Complainant) v. Stearns and Foster Canada Limited, (Non-Woven Fabrics), (Respondent). (*Withdrawn*).

2392-83-U: Cynthia McLean, (Complainant) v. The Corporation of the City of Brockville, (Respondent). (*Withdrawn*).

2412-83-U: Teamsters Local Union No. 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. O. Browne & Co. Ltd., (Respondent). (*Withdrawn*).

2431-83-U: William Douglas, (Complainant) v. Humber College, (Respondent). (*Withdrawn*).

2434-83-U: Arnel Aube, (Complainant) v. Bob Gilks President of Local 1031, United Steelworkers of America, (Respondent). (*Withdrawn*).

2437-83-U: The Canadian Guards Association, (Complainant) v. Falconbridge Limited, (Respondent). (*Withdrawn*).

2438-83-U: Retail, Wholesale and Department Store Union, AFL, CIO, CLC, (Complainants) v. Sheridan Inn, (Respondent). (*Withdrawn*).

2447-83-U: Hotel Employees Restaurant Employees Union, Local 75, (Complainant) v. Villa Canale Hotel Inc., (Respondent). (*Granted*).

2451-83-U: Office & Professional Employees International Union, Local 343, AFL, CIO, CLC, (Complainant) v. United Food and Commercial Workers International Union, AFL, CIO, CLC, Region 18 - Canada, (Respondent). (*Withdrawn*).

2458-83-U: International Brotherhood of Electrical Workers, Local 636, (Complainant) v. The Regional Municipality of Peel, (Respondent). (*Withdrawn*).

2459-83-U: United Brotherhood of Carpenters and Joiners of America, Local 1256, (Complainant) v. Cecco Supply Limited, (Respondent). (*Withdrawn*).

2483-83-U: Giovanni Bitti Haulage, (Complainant) v. Indusmin Ltd. (Construction Aggregates Division), (Respondents) v. Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, (Intervener). (*Withdrawn*).

2486-83-U: Nick Crenkovich, (Complainant) v. U.E. Local 508 and C.G.E. Scarborough Plant (Respondent). (*Withdrawn*).

2487-83-U: Canadian Standards Association, (Complainant) v. CUPE and its Local 967, Brian Atkinson, Ray Sutter, Robert Heaton, Les Szibbo, Guido Salerno, Paul Benson, Carmen Caruana, Angela Lester, (Respondents). (*Withdrawn*).

2497-83-U: Local 109 Members, Shawn Kydd et al, (Complainant) v. Canadian Papermakers Union, (Respondent). (*Withdrawn*).

2544-83-U: Retail, Wholesale and Department Store Union, AFL, CIO, CLC, (Complainant) v. Morningstar Trading Company, (Respondent). (*Withdrawn*).

2555-83-U: Robert Stephen Dunn, (Respondent) v. United Rubber, Cork, Linoleum and Plastic Workers of America Local 973, (Respondent). (*Withdrawn*).

2570-83-U: Melvin A. Shepley, (Complainant) v. Local 444 U.A.W. Windsor, Ontario, (Respondent). (*Withdrawn*).

2574-83-U: Ladelle Hiles, (Complainant) v. Carman Dinanno, (Respondent). (*Dismissed*).

2578-83-U: Elizabeth Montgomery, (Complainant) v. C.U.P.E. Union Local 57, Guelph, Ontario, (Respondent). (*Withdrawn*).

2585-83-U: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (U.A.W.), (Complainant) v. Circle C Fabricating Limited, (Respondent). (*Withdrawn*).

2596-83-U: Ontario Nurses' Association, (Complainant) v. Haldimand-Norfolk Regional Health Unit, (Respondent). (*Withdrawn*).

2666-83-U: Brian Kinnon, Danny Woods, Charley Scriberrass, Dennis Horner, Joe Vitale, Rick Fukuda, Ron Pshyshlak, Pat Lenese etc., (Complainant) v. The Retail, Wholesale Department Store Union (R.W.D.S.U. Local #414) and Dominion Stores Limited, (Respondents). (*Withdrawn*).

2669-83-U: William Michael Lowe, (Complainant) v. Linda Hamilton, President, C.U.P.E. Local 1909, (Respondent). (*Withdrawn*).

APPLICATION FOR CONSENT TO PROSECUTE

2512-83-U: The Canadian Union of Public Employees, and it's Local 967, (Applicant) v. The Canadian Standards Association, (Respondent). (*Withdrawn*).

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

2455-83-M: Robson-Lang Leathers Inc., (Employer) v. The Ontario Council of Leather Workers and United Food and Commercial Workers and United Food and Commercial Workers International Union and Local 0485, (Trade Union). (*Granted*).

2587-83-M: The Sanderson-Harold Company, (Employer) v. United Brotherhood of Carpenters and Joiners of America, Local Union 3189, (Trade Union). (*Granted*).

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

1179-83-M: Canadian Union of Operating Engineers and General Workers, (Applicant) v. Corporation of the Town of Durham, (Respondent). (*Withdrawn*).

2156-83-M: Office and Professional Employees International Union, Local 26, (Applicant) v. The Soo & District of Algoma Credit Union Limited, (Respondent). (*Terminated*).

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

2418-83-OH: Raymond Larocque, (Complainant) v. A Towing Service, (Respondent). (*Withdrawn*).

2433-83-OH: Arnel Aube, (Complainant) v. Stelco C.D.W., 155 Chatham and mentioned Supervisors involved and workers mentioned, (Respondent). (*Withdrawn*).

2553-83-OH: Gregory J. Fortin, (Complainant) v. Ontario Hydro Service Dept. Manager, George Williams; Prod. Manager, Gord Fraser, Shift Supervisor, Pat Ragsdale Shift Maint. Super, John McDowell, (Respondents). (*Withdrawn*).

COLLEGES COLLECTIVE BARGAINING ACT

Applications for Religious Exemption

1564-83-M: Paul Tremblay, Steward, Local 350, OPSEU, (Applicant) v. The Ontario Public Service Employees Union, (Respondent Trade Union) v. Georgian College of Applied Arts and Technology, (Respondent Employer). (*Dismissed*).

CONSTRUCTION INDUSTRY GRIEVANCES

0746-82-M; 1541-82-M; 1542-82-M: I.B.E.W. Electrical Power Systems Construction Council of Ontario and International Brotherhood of Electrical Workers, Local 1788, (Applicants) v. Ontario Hydro, (Respondent). (*Dismissed*).

2215-82-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Dominion Stores Ltd. and Min-A-Mart Ltd., (Respondent). (*Granted*).

1718-83-M: International Brotherhood of Painters and Allied Trades, Local 205, (Applicant) v. Eastern Sandblasting & Painting Ltd., (Respondent). (*Granted*).

1930-83-M: International Brotherhood of Boilermakers' Local Union 128, (Applicant) v. Tri-Con Mechanical (Sarnia) Limited and Tri-Con Mechanical Holdings Ltd., (Respondents). (*Granted*).

2066-83-M: The Carpenters' District Council of Toronto & Vicinity, United Brotherhood of Carpenters and Joiners of America on behalf of Local Union 1190, (Applicant) v. Union Carpentry Contractors Ltd., (Respondent). (*Granted*).

2131-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. St. Catharines Concrete Forming, (Respondent). (*Granted*).

2244-83-M: The Ontario Provincial Conference of the International Union of Bricklayers & Allied Craftsmen, Local 9, (Applicant) v. J. & W. Construction Ltd., (Respondent). (*Withdrawn*).

2277-83-M: United Brotherhood of Carpenters and Joiners of America, Local 1190, (Applicant) v. C.A.S. Carpentry, (Respondent). (*Granted*).

2301-83-M: Ontario Council of the International Brotherhood of Painters and Allied Trades, (Applicant) v. Busch Painting Limited, (Respondent). (*Granted*).

2312-83-M: International Union of Operating Engineers, Local 793, (Applicant) v. Myco Construction, (Respondent). (*Granted*).

2327-83-M: The Ontario Council of the International Brotherhood of Painters and Allied Trades Local 1494, (Applicant) v. Cassolato Painting and Decorating Limited, (Respondent). (*Withdrawn*).

2396-83-M: Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen, (Applicant) v. Enzo & Mark Construction Ltd., (Respondent). (*Withdrawn*).

2414-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. T. F. Construction Ltd., (Respondent). (*Granted*).

2424-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. Lucy Construction Ltd., (Respondent). (*Withdrawn*).

2425-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. Inverleigh Construction Ltd., (Respondent). (*Withdrawn*).

2429-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. Midview Const. & Drain Ltd., (Respondent). (*Granted*).

2440-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. Thornhill Excavating & Grading Ltd., (Respondent). (*Withdrawn*).

2441-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. Ranac Forming Limited, (Respondent). (*Withdrawn*).

2443-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. G. L. Trenching Ltd., (Respondent). (*Withdrawn*).

2469-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. F E D Construction Company, (Respondent). (*Withdrawn*).

2472-83-M: Local 200 of the Ontario Council of the International Brotherhood of Painters & Allied Trades, (Applicant) v. Covalco Construction Services Ltd., (Respondent). (*Withdrawn*).

2474-83-M: Labourers' International Union of North America, Local 506, (Applicant) v. Bemac Industries Ltd., (Respondent). (*Withdrawn*).

2482-83-M: Labourers' International Union of North America, Ontario Provincial District Council, (Applicant) v. Teperman and Sons Inc., (Respondent). (*Withdrawn*).

2484-83-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 113, (Applicant) v. B. A. Robinson Plumbing and Heating, (Respondent). (*Withdrawn*).

2485-83-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 113, (Applicant) v. Uniton Mechanical Ltd., (Respondent). (*Withdrawn*).

2497-83-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Maco Construction Co., (Respondent). (*Withdrawn*).

2502-83-M: Drywall, Acoustic, Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Nap-Mon Construction Ltd., (Respondent). (*Withdrawn*).

2508-83-M: The Millwright District Council of Ontario on its own behalf and on behalf of Local 1151, (Applicant) v. Kamtar Construction Ltd., (Respondent). (*Granted*).

2518-83-M: Drywall, Acoustic, Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Acadian Acoustic Co. Limited, (Respondent). (*Granted*).

2547-83-M: United Brotherhood of Carpenters and Joiners of America, Local 2041, (Applicant) v. Brunswick Drywall Ltd., (Respondent). (*Withdrawn*).

2559-83-M: United Brotherhood of Carpenters and Joiners of America, Local 1190, (Applicant) v. Karl Thier Construction Ltd., (Respondent). (*Granted*).

2567-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. Ontario Paving Company, (Respondent). (*Withdrawn*).

2586-83-M: Labourers' International Union of North America, Local 1059, (Applicant) v. Hardrock Company Limited, Gold Structural Limited, CDC Concrete Forming, (Respondents). (*Withdrawn*).

2649-83-M: Construction Workers Local 53, CLAC, (Applicant) v. Dezan Building Systems Limited, (Respondent). (*Granted*).

2650-83-M: International Association of Bridge, Structural and Ornamental Iron Workers, Local Union No. 736, (Applicant) v. Rollins Steel Services Ltd., (Respondent). (*Granted*).

2661-83-M: Labourers' International Union of North America, Local 1081, (Applicant) v. McKinlays of Cambridge, (Respondent). (*Granted*).

2695-83-M; 2696-83-M: Labourers' International Union of North America, Local 1059, (Applicant) v. Ellis Don Limited, (Respondent). (*Withdrawn*).

APPLICATION OF RECONSIDERATION

2116-83-M: The Homewood Sanitarium of Guelph Ontario Limited, (Applicant) v. Ontario Nurses' Association, (Respondent). (*Dismissed*).

*Ontario Labour Relations Board,
400 University Avenue,
Toronto, Ontario*

ISSN 0383-4778



Ontario
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**A Monthly Series of Decisions from the
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Cited [1984] OLRB REP. APRIL

Selected decisions of particular reference value are
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Reports*, Butterworth & Co., Toronto.

Typeset, Printed and Bound by Union Labour in Ontario

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2800-83-U Service Employees Union, Local 204, Complainant, v. Trailer Master Freight Carriers Limited c.o.b. as Atripco Delivery Service, Respondent

Change in Working Conditions – Unfair Labour Practice – Employee denied work on basis of company policy requiring employee cars be painted black – Employer agreeing to stipulated facts in prior certification proceedings that no such policy existed on application date – Attempting to correct stipulated fact after grievor denied work – Board members in majority holding freeze applied to stipulated fact and finding breach

BEFORE: Richard M. Brown, Vice-Chairman, and Board Members J. A. Ronson and F. S. Cooke.

APPEARANCES: *Stephen Krashinsky and Aller Ferens for the complainant; Brian Burkett, Greg Service and Lloyd Service for the respondent.*

MAJORITY DECISION OF BOARD MEMBERS F. S. COOKE AND J. A. RONSON;
April 18, 1984

1. Betty Hamilton uses her own car to make deliveries for the respondent employer ("Atripco"). Prior to February 1984 the car that she used was painted red. In February 1984 she purchased a new car and brought it to work on February 16th. She was told by Atripco that she would have to paint her new car black, according to company policy. She disputed that such a policy existed. Atripco sent her home and told her that it would provide work to her when she returned with a black car. As a result, the complainant union filed this complaint with the Board, alleging breaches of sections 64, 66, 70, 79 and 80 of the *Labour Relations Act*.

2. We are of the opinion that the complaint is valid because of what took place in certification proceedings between the union and Atripco before the Board. (Board File No. 0193-83-R). The parties agreed to the following facts before us:

(a) The Union applied for certification on April 27th, 1983. Various issues arose concerning the status of persons working for Atripco and in an effort to expedite matters the parties agreed to numerous stipulated facts before the Board panel hearing the certification;

(b) One of the stipulated facts was:

"While there was a policy that cars be painted black, this is not the case today (83/6/21) *nor on the application date*. At best, it is something that is encouraged";

(our emphasis)

(c) By letter dated February 20, 1984, Atripco advised the panel hearing the certification matters that:

“We are writing on behalf of Atripco Delivery Service (the “Respondent”) to correct a mis-statement of fact which was inadvertently submitted to the Board by the Respondent during the first day of hearings into the above-noted application.

It has recently come to our attention that the Respondent’s policy has been, and remains, that each driver, when purchasing a new vehicle, is expected to purchase it in the colour black. Failing that, a driver is required to have the vehicle painted black at his own expense. This is contrary to our earlier submission to the Board wherein it was stated that each driver was encouraged to purchase a new vehicle in the colour black.”

3. Counsel for Atripco advised us that evidence would be led to prove that since August, 1982 the employees have been divided into two groups, those hired before that month and those hired after. Those employees hired before August 1982 were encouraged to paint their cars black and if they purchased a new vehicle it had to be black. Those hired after had to have a black car from the start (although there was some leeway on compassionate grounds). Betty Hamilton was hired before August, 1982 and her replacement vehicle had to be black (as had been the case when 22 out of 64 drivers purchased replacement vehicles). When the parties agreed to the stipulated fact or car colour they were not directing their minds to the definition of terms and conditions of employment, rather it was simply one of a hundred facts that were stipulated in order to expedite the certification hearing. For the purposes of our decision, we are willing to accept these facts as being the best case of Atripco in defence of this complaint.

4. We believe that section 79(2) of the Act applies to the stipulated fact on car colour. That sections reads:

Where a trade union has applied for certification and notice thereof from the Board has been received by the employer, the employer shall not, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty of the employer or the employees until,

(a) the trade union has given notice under section 14, in which case subsection (1) applies; or

(b) the application for certification by the trade union is dismissed or terminated by the Board or withdrawn by the trade union.

5. Atripco has attempted to withdraw its consent to the agreed condition of employment respecting car colour. That attempt was made after Betty Hamilton was sent home on February 16, 1984. Notwithstanding the alleged mis-statement of fact we feel that, for the purposes of the Act, on that date there was no policy or condition of employment dealing with car colour that would apply to Betty Hamilton. We express no opinion as to whether on different facts it is open to the employer to withdraw its agreement to the stipulation on car colour.

6. Since Atripco has violated the "freeze" provisions of section 79(2), we direct that Betty Hamilton be returned to her position with full compensation together with interest. We note that at the hearing the union withdrew its other remedial requests. The Board remains seized should the parties not be able to agree on the amount owing to Ms. Hamilton.

DECISION OF RICHARD M. BROWN, VICE-CHAIRMAN;

1. In this complaint under section 89 of the *Labour Relations Act*, Local 204 of the Service Employees Union (the "union") contended that Trailer Master Freight Carriers Limited, carrying on business as Atripco Delivery Services (the "employer") had contravened sections 64, 66, 70, 79 and 80 of the *Labour Relations Act*.

2. The grievor, Betty Hamilton is employed as a driver and is required to provide her own vehicle. Her car is painted red. On February 16, 1984, the grievor was told by the employer that she would have to paint her car black. As she has refused to comply with this direction, she has not worked since February 16th.

3. The union relies upon a statement of fact agreed to by the parties in a certification proceeding commenced on April 27, 1983. One of the issues in that proceeding was whether or not drivers were dependent contractors within the meaning of section 1(1)(h) of the Act. On the 21st of June, 1983, the parties agreed to a long list of stipulated facts relating to this issue, including one relating to the colour of cars:

While there was a policy that cars be painted black, this is not the case today (83/6/21) nor on the application date. At best, it is something that is encouraged.

4. By letter dated February 20, 1984, the employer advised the Board that the statement of facts agreed to in the certification proceedings was inaccurate with respect to the colour of cars. The employer contended at the hearing before this panel that someone in the position of the grievor was required to have a black car by virtue of a policy which was introduced in August of 1982 and has remained unchanged since that date. According to the employer, persons employed prior to August, 1982 were not required to have the car that they drove on that date painted black – they were only encouraged to do so. However, the policy required that all replacement vehicles be black. (Of the twenty-three employees hired before August 1982 who have purchased new vehicles after that date, all but one acquired a black car. The single exception was an oversight on the part of management.) Persons employed after August, 1982 were required to have their cars painted black within 3 months of being hired. (There are approximately forty current employees in this category. The 3 months period was sometimes extended to accommodate an employee whose car would have to be replaced shortly after the normal deadline.) On the basis of this alleged policy, the employer contended the grievor was required to have a black vehicle. She was hired prior to August, 1982 and bought a replacement vehicle early in 1984.

5. The majority holds that the employer contravened section 79(2) of the Act:

Where a trade union has applied for certification and notice thereof from the Board has been received by the employer, the employer shall not, except with the consent of the trade union, alter the rates of wages or

any other term or condition of employment or any right, privilege or duty of the employer or the employees until,

- (a) the trade union has given notice under section 14, in which case subsection (1) applies; or
- (b) the application for certification by the trade union is dismissed or terminated by the Board or withdrawn by the trade union.

6. In the view of the majority, whatever the policy about black cars on the date of the application for certification, the parties later agreed – in the stipulated list of facts – that employees were not required to have black cars. This agreement is treated by the majority as a term or condition of employment which cannot be altered until the section 79(2) freeze expires. Accordingly, they would find a violation even if the employer made an error in describing the terms and conditions of employment.

7. I cannot agree with the conclusion of my colleagues. I would not find an agreed term or condition of employment unless the employer either intended to create a new term or condition of employment or conducted itself so as to lead the union or employees to believe that a new term or condition had been established. In my view, neither of these conditions is satisfied in the case at hand. In the absence of evidence to the contrary, I assume that the employer's intention in the certification proceeding was to describe existing terms and conditions of employment, not to create new ones. Assuming the union's intention to be the same, I would not conclude that it was led to believe that the existing policy about black cars had been altered. Nor would I conclude that employees were led to believe that the policy had been changed, as there is no evidence that any employees were aware of the statement of fact agreed to in a certification proceeding.

8. Accordingly, I would have to hear evidence relating to the true policy concerning black cars before turning to the other aspects of this complaint.

2851-83-M Barkman Builders Ltd., Employer, v. United Brotherhood of Carpenters and Joiners of America, Trade Union

Abandonment – Conciliation – Reference – Union having no reasonable way of knowing employer active – Failure to seek conciliation or grieve not abandonment in circumstances – Union not required to search all building permits issued in area – No abandonment and Minister having authority to appoint conciliation officer

BEFORE: Kevin M. Burkett, Alternate Chairman and Board Members J. A. Ronson and W. F. Rutherford.

APPEARANCES: *W. J. McNaughton and Kenneth Barkman for the employer; David McKee and Bill Sherman for the trade union.*

DECISION OF THE BOARD; April 24, 1984

1. This is a reference from the Minister under section 107 of the *Labour Relations Act* in which he asks whether he has the authority to appoint a conciliation officer under section 16 of the Act.

2. A request for conciliation services was filed by the trade union on January 23, 1984 and a conciliation officer was appointed by the Minister on February 6, 1984. The employer objected to the appointment on the grounds that there were no bargaining rights extant as the union had abandoned its bargaining rights in respect of the unit for which conciliation services had been granted. The Minister, after reviewing the written submissions of the respective parties, revoked the officer's appointment and referred the matter to the Board under section 107 of the Act for its advice.

3. The facts in this matter are straightforward. The union was certified on February 7, 1979 and served notice to bargain on the employer by letter dated February 14, 1979. The certificate was later returned to the Board because the employer had been improperly identified, was reissued and a second notice to bargain was served on July 16, 1979. Mr. Barkman testified that he received the first notice to bargain after February 16th, the date suggested for a first meeting, so that he did not attend at any meeting on that day. Mr. Barkman is not aware of any further correspondence. He never bargained with the union and was never served with notice of application for an appointment of a conciliation officer before the instant request for conciliation was filed.

4. Mr. Barkman, the owner of the respondent company, who lived in Manitoba at the time of certification and continues to live there, testified that the respondent company has been continuously working within the geographic area (district of Kenora) of the union's bargaining rights since the issuance of the certificate. The company has not used the union hiring hall nor made any remissions to the union during this period. It is his evidence that the company has had no contact whatsoever with the union since 1979. With four exceptions the jobs performed by the company during this period were either home renovations or the erection of cottages on lake front property within the area. The four exceptions are work done on a mini-mall in 1979, renovations done at Homestake House, a children's home operated by a social agency, work on a 36 unit apartment project from July to December, 1982 and finally, work

on a condominium project in late 1983 – early 1984. It is common ground that the mini-mall project was within the ICI sector and that the company was bound by a province-wide ICI sector agreement. The request for conciliation services which led to this reference was filed in connection with the condominium project.

5. Mr. Bill Sherman, the union's business representative in the area since 1958, works out of Kenora. It is his evidence that in addition to the written notices to bargain he spoke with Mr. Barkman on the telephone at about this time and was told by Mr. Barkman that he would let him know if he had more work. He testified that Mr. Barkman never called. Mr. Barkman had no recollection of the conversation. Mr. Sherman testified that he usually travels about the area in his car and if he sees any job in progress he attempts to find out what is being done and by whom. With the exception of the mini-mall job in 1979 he did not see anything to lead him to believe that the company was active in the union's geographic area between 1979 and 1984. He testified that he became aware of the mini-mall job in its final stages and when he visited the site was told by the owner that Mr. Barkman had performed the work himself. The evidence is that Barkman entered into a partnership with another company in respect of the 36 unit apartment job that was carried on between July and December, 1982 and that the work was bid by and carried on in the name of the partner. Mr. Sherman testified that there was no way he could have known if renovation work was carried out at Homestake House during the relevant period.

6. The evidence is that the residential work carried on by Barkman required building permits. There is no evidence, however, as to whether these permits showed the name of the contractor. Mr. Sherman did not do a check of building permits during the relevant period for the purpose of ascertaining if Barkman was working in the area.

7. The company argues that in the face of the work carried on by Barkman in the area since 1979 and in the absence of any attempt by the union to rely on or enforce its bargaining rights it must be found that the union has abandoned its bargaining rights. The company relies specifically on the failure of the union to further the negotiating process by seeking conciliation services and possibly a "no-board" report in 1979 and its failure to file a grievance in respect of the mini-mall job that was clearly within the ICI sector. The company argues that on a review of the factors listed in *Re J. S. Mechanical* [1979] OLRB Rep. Feb. 110 we must conclude that the union has abandoned its bargaining rights and cannot now rely on them. The company points out that Barkman was certified while performing residential work at a time when Mr. Barkman was resident at the same location in Manitoba where he presently resides. The company argues that the union cannot sleep on its rights for a period of five years during which time the company continued to perform residential work and then reappear when it is engaged on a large condominium project.

8. The union, citing the decision of the Divisional Court in *Re Carpenters District Council et al and John Entwistle Construction Ltd. et al* (1980) 125 D.L.R. (3d) 568, argues that abandonment is a question of fact and that on the facts of this case a finding of abandonment cannot be made. The union maintains that with the exception of the mini-mall job it had no way of knowing that Barkman was in the area. The union submits that it is not required to check every building permit issued for renovation work. The union also submits, relying on *Inducon Construction (Northern) Inc.* [1982] OLRB Rep. March 390, that it was not required to undertake the academic exercise of requesting conciliation services and pursuing a no-board report when Barkman had stopped working in the area and the union had no way

of reasonably knowing that Barkman had commenced other work in the area. It is the union's position that it was entitled to wait until it had knowledge that Barkman was working in the area before seeking conciliation services without jeopardizing its bargaining rights. Finally, the union maintains that having been told that Mr. Barkman performed the work on the mini-mall himself there was no grounds upon which to pursue a grievance under the ICI agreement. Having regard to the foregoing, the union maintains that the facts do not support the conclusion that the union abandoned its bargaining rights.

9. The Divisional Court in *Re Carpenters District Council et al and John Entwistle Construction Ltd. et al, supra*, upheld the jurisdiction of the Board to find, as a question of fact, that a union has abandoned and can no longer rely on its bargaining rights. The factors considered by the Board in making a finding of abandonment are outlined in *J.S. Mechanical, supra* as follows:

5. In assessing the bargaining relationship between the union and the employer to determine whether or not a union has abandoned its bargaining rights, the Board considers various factors. Among other possible indicators, the Board looks to the length of the union's inactivity, whether it has made attempts to negotiate or renew a collective agreement, whether the union has sought to administer the collective agreement through the grievance and arbitration provisions in the collective agreement, whether terms and conditions of employment have been changed by the employer without objection from the union as well as whether there are any extenuating circumstances to explain an apparent failure to assert bargaining rights.

10. The fact of inactivity, as in this case, does not in and of itself establish abandonment. (See *Inducon Construction (Northern) Inc., supra* and the cases referred to therein.) In the construction industry an employer must be working within the geographic area for which the union holds bargaining rights and, especially where the bargaining rights are in respect of an area such as the District of Kenora, there must be a reasonable basis upon which to conclude that the union ought to have known that the employer was active. In this case we are satisfied that, with the exception of the mini-mall job, the union did not know that Barkman was active in the area nor, on the evidence, ought it to have known. We do not accept that the union was required to search all of the building permits issued in the area in respect of house renovations and cottage building. The Homestake job was a renovation that was not visible from the road and the apartment complex job was carried on under the name of Barkman's partner. We are satisfied that Mr. Sherman conducted himself in a manner designed to keep himself abreast of the work being carried on in the area and that he had no reasonable way of knowing that Barkman was active in the area.

11. We concur with the statement made by the Board at paragraph 13 of the *Inducon* case, *supra* that "a trade union is not required to perform academic exercises with an employer in the construction industry in order to represent non-existent employees." Although there were employees in this case the union had no knowledge of them and, as we have found, there is no reasonable basis upon which it ought to have known. In these circumstances, there was no requirement upon the union to file for conciliation services and push for a "no-board" report. The failure of the union to do so or to otherwise actively pursue its bargaining rights therefore does not support a finding of abandonment.

12. Finally, the failure of the union to file a grievance under the ICI agreement in respect of the mini-mall job does not support a finding of abandonment. Mr. Sherman visited that job site and was told by a person in authority that Mr. Barkman had performed the work himself. Based on the size of the job, Mr. Sherman had no reason to doubt the information he had been given and, in these circumstances, we do not interpret his failure to grieve as conduct consistent with an abandonment of bargaining rights.

13. Having regard to all of the foregoing, we find that the union has not abandoned its bargaining rights. Accordingly, our advice to the Minister is that he has the authority to appoint a conciliation officer under section 16 of the Act.

1490-83-U Maurice Berlinguette, Pat Proulx, Lionel Trudel, Paul Pilon, Complainants, v. Labourers' International Union of North America, Local 1036, Respondents

Duty of Fair Referral – Practice and Procedure – Unfair Labour Practice – Referral duty not restricted to union acts or omissions in actual selecting, referring etc. – Including arbitrary, discriminatory or bad faith refusals to make hiring hall records available for inspection – Union official not proper respondent in section 69 complaint – Board not deferring to internal union procedures – Hearing adjourned as some allegations not particularized

BEFORE: Owen V. Gray, Vice-Chairman.

APPEARANCES: A. Bradley, Maurice Berlinguette, Pat Proulx, Lionel Trudel and Paul Pilon for the complainants; S. B. D. Wahl and J. Lewis for the respondents.

DECISION OF THE BOARD; April 2, 1984

1. In this complaint filed October 3, 1983, the complainants named the respondent trade union and "Jimmie Lewis, Business Manager and Secretary-Treasurer" as respondents, and alleged that the respondents had dealt with them contrary to the provisions of section 69 of the *Labour Relations Act*. The complaint came on for hearing before the Board on February 23, 1984, when certain preliminary matters were argued by counsel for the respondent and by the complainants' representative and fellow trade union member, Anthony Bradley. The Board ruled on those matters orally at the hearing, which was then adjourned. This decision will serve to confirm those rulings, set out the circumstances in which they were made and elaborate the reasons for them.

2. In their complaint of October 3, 1983, the complainants described the respondents' alleged offence as follows:

On or about Sept. 6/83 and Sept. 9/83 the grievors were dealt with by Jimmie Lewis, Bus. Manager and Sect. Treasurer, Local 1036 of the Labourer's International Union of North America of the respondent contrary to the provisions of section Sixty-Nine (69) of the *Labour Relations Act* in that he did on his own behalf or on behalf of the respondent: His

refusal to provide us with copies of “out of work” list and job referrals list dating back from January 1983 to September 1983. We made this request to Jimmie Lewis (Bus. Manager), in the presence of the Office Secretary, on Sept. 6/83 at 4.30 p.m. until 5.30 p.m. and again on Sept. 9/83 at 11.30 a.m. We insisted on our rights. His answer was he didn’t know our rights, and wasn’t prepared to provide this information.

The complainants requested that the Labour Relations Board:

- (1) Hear and Resolute [sic] the complaint filed – 83
- (2) Deal with the members charges;
- (3) And the complainants be recompensed for any loss of wages, benefits, and costs for representation.

Under “other relevant statements”, the complainants made the following allegation:

We allege that Jimmie Lewis has violated Article 69 of the Labours [sic] Relations Act. by using his office as an Instrument of Favoritism and patronage, due to his hiring hall practice.

3. The respondent’s Reply raised most of the preliminary matters ultimately dealt with at the Board’s hearing. It alleged that the Complaint did not make out a *prima facie* case for the remedy requested and, apart from the bald allegation under “other relevant statements”, did not disclose any conduct which could be construed to violate section 69 of the *Labour Relations Act*. In the alternative, it submitted that the complainants’ allegations were insufficiently particular, and should be fully particularized in accordance with Rule 72 of the Board’s Rules of Procedure. In any event, it submitted, Mr. Lewis was not properly named as a respondent, and his name should be struck out. Without prejudice to those positions, the respondents denied the complainants’ allegations and specifically alleged that documentation was available to the complainants for examination at the trade union’s office during office hours.

4. The complaint was first scheduled for hearing on November 3, 1983, but was adjourned *sine die* on consent of the parties. By letter dated November 23, 1983, counsel for the respondents advised the Board that the complainants had delivered no further particulars. The letter reiterated the position taken in the respondent’s Reply. That letter was circulated to the complainants, whose representative, Anthony Bradley, responded by letter dated December 16, 1983. In his letter, Mr. Bradley alleged that certain of the complainants had made further visits to the union office December 2, 5, 12 and 14, 1983, for the purpose of obtaining further information with respect to the operation of the respondent’s hiring hall. He alleged that the complainants submitted a “list of names to be checked by Mr. Lewis”. He then set out the following:

RE: Information Seeking Effort

DANZ, Ed

Laid off June 29th, 1983 Lumus construction and
he was #626 on out of work list.

Worked for Laurentian Masonry. Rehired September 21st, 1983 to September 28th, 1983. #548 on out of work list on October 2nd, 1983. Laid off October 10th, 1983. The complainants asked to see the work card and Mr. Lewis answered with an emphatic "NO".

BERG, Jack	Was #169 on out of work list – worked February 19th, 1982. Hired September 7th, 1983 to September 20th, 1983 for Sampson Construction. He had no recall rights. The complainants asked to see his work card – once again an emphatic "NO" by Mr. Lewis.
BASTOS, A.	Was #342 on out of work list. He was hired by Van Bots Company on September 22nd, 1983. The complainants asked to see the work card once again – again an emphatic "NO" by Mr. Lewis.
WAITO, Percy	#293 on out of work list. Hired November 9th, 1983 for Sampson Construction. He had no recall rights.
MANCINI, Lou	Mr. Lewis would not give any information and became very aggravated [sic].
FOLZ, Richard	Mr. Lewis would not give any information.
LACELLE, Pat	Mr. Lewis would not give information.
CHILELLI, Vincent	Mr. Lewis would not give any information. We believe Mr. Chilelli worked for Wardette Company.

The letter went on:

We have provided new names to be checked but as you can see we cannot obtain the exact information we want because Mr. Lewis will not give it to us, although his representative stated he would in your letter dated November 24th, 1983. We also have several other names that should be checked.

• • • •

We are not going to Local 1036 again for information. We ask you to schedule a hearing as soon as possible and invoke your power according to Article 103.

By letter dated January 23, 1984, counsel for the respondent took the position that the Board should entertain no allegations other than allegations relating to the eight names mentioned in

the passage quoted above. In particular, it asked that the Board not entertain any allegations with respect to the “new names to be checked” and “several other names that should be checked” which are referred to in Mr. Bradley’s letter. The respondent repeated its allegation that documentation is available to the complainants:

We wish to emphasize that the Complainants have had unrestricted access to the computerized hiring hall out-of-work lists and consequently are fully able to give full and complete particulars of any referral alleged to be contrary to Section 69 of the Act.

That letter was circulated to the complainants and their representative, whose response was simply that the matter ought to proceed to hearing.

5. At the beginning of the Board’s hearing on February 23, 1984, the Board asked Mr. Bradley to outline the issues of fact with which the complainants wanted the Board to deal, and the nature of the remedies which the complainants would be asking the Board to provide. In his response, Mr. Bradley told the Board that the complainants want to get a set of rules with respect to the operation of the union’s hiring hall. They are all union members, and have all been officers of the union at one time or another. They feel that a detailed accounting of hiring hall operations is needed. They are not happy with the documentation available to them. They want documentation which would tell them who worked where on any particular occasion. They want to know what the classifications are which determine referrals. To this end, he said, the complainants want a directive from the Board just like the directive in the *Portiss* case ([1983] OLRB Rep. June 1160). Mr. Bradley explained that the rules and regulations governing the operation of the respondent’s hiring hall have been under consideration by a committee of members and by the Executive Board of the respondent union. One of the complainants is a member of both the committee and the Executive Board. In the circumstances, the complainants feel that the Board’s decision in this complaint would and should have a bearing on the question of what rules and regulations the Local Union should have in place. Asked what had prompted the request for documentation which is referred to in the complaint, Mr. Bradley said the complainants had become aware of work referrals which they thought were in violation of certain motions of the Local Union. Mr. Bradley was initially reluctant to say much more about these suspicions, because he had subpoenaed certain witnesses and did not wish them to hear the allegations. Asked who the witnesses were, he replied that they were the President and Recording Secretary of the Local Union. The Board explained to Mr. Bradley that the union would have to be told what the allegations against it were, if the Board was to deal with those allegations. Mr. Bradley then said the complainants think that Mr. Reynolds, the Local’s President, and Mr. Soupa, the Local’s Recording Secretary, were referred out to work for a particular employer in August of 1983, when others ahead of them on the out-of-work list remained unemployed. The complainants feel these referrals constituted the granting of a preference to members of the Local Union executive, something which they claim is contrary to a motion passed by the membership in 1979. Mr. Bradley confirmed that the complainants wish the Board to review those referrals, and the referrals of the 8 members named in the above-quoted passage from his letter of December 16, 1983, and the referrals of other members as well. In response to the union’s position that out-of-work lists were available for inspection by the complainants, Mr. Bradley argued that those lists are of little use in assessing referral practices. The absence of a name from those lists, he said, would not mean that that person was at work. The refusal of the trade union to produce a referral book or the work history cards of members left the complainants without

the means to assess the propriety of work referrals made apparently out of order relative to the out-of-work list. Employers, he said, were entitled to specify members by name when requesting referrals, if the members had worked for that employer within the previous year. Thus, the complainants would need to have the details of each referral and the work history of the previous year of the member referred, in order to assess the operation of the hiring hall. This information, he said, had been refused by Mr. Lewis.

6. The respondent's computerized record-keeping system was described in the respondent's filings, and the description was elaborated in the representations of its counsel at hearing. The "out-of-work list" is said to be maintained by computer and updated each week. The current and previous out-of-work lists are kept in the union office and are said to be available for inspection by any member during union office hours. These lists vary in length from 20 to 30 pages. Copies of lists will be provided upon payment of photocopying charges of 25¢ per page. The "job referrals book" is no longer maintained. When a referral is made, the computer prints a job referral slip in duplicate. One copy goes to the employer; the other is provided to the employee. No copy is maintained by the union; there is no "hard copy" document which members can consult to determine what referrals were made on any particular day. Hiring halls typically maintain work history cards with respect to each member, setting out dates of referral to named employers, along with other information. Data of this sort is maintained in the respondent's computer. Hard copy of this data can be obtained by the business manager but is not, apparently, kept on hand at the union's office. While the out-of-work lists are made available for inspection by any member, the union takes the position that it will not and should not provide one member's work history information to another. The union will, counsel says, respond to a request for information with respect to a specific referral by providing any information from the work history which is relevant to that referral. From the comments of counsel, however, it appears there is at least one caveat to that position. The union has refused, and apparently considers itself justified in refusing, information with respect to the referral of a particular member when that member stood higher on the out-of-work list at the time of referral than did the member requesting the information. However, counsel advised the Board that the respondent trade union is prepared to make available for inspection all documents in its possession relevant to any identified referral about which a complaint is made. He was prepared to have this regarded as an undertaking to the Board and, by way of clarification, made it clear that the documentation it is prepared to produce includes not only the documentation maintained at its office in hard copy form but also documentation, like an individual employee work record, which is not normally maintained in "hard copy" but can be produced by the computer on request.

7. As was explained to the parties at the hearing, the representations summarized here and the other representations made at the hearing were not received as a substitute for evidence under oath, but as an elaboration of the parties' respective positions in this case.

8. As part of his representations, counsel for the respondent argued the preliminary matters raised in his filings with the Board, respecting the absence of a *prima facie* case and lack of particularity in the complaint. He also asserted an argument not previously raised in those filings: that the Board ought to dismiss the complaint in deference to the alleged availability to the complainants of procedures under the applicable Local Union, District Council and International Union constitutions.

9. In support of his position that the complaint fails to disclose a *prima facie* case for

relief, counsel for the respondent argued that a denial of access to hiring hall records is not a violation of section 69 of the *Labour Relations Act*, and cannot be a violation of that section even if the denial or refusal is itself arbitrary, discriminatory, or in bad faith. Section 69 of the *Labour Relations Act* reads as follows:

69. Where, pursuant to a collective agreement, a trade union is engaged in the selection, referral, assignment, designation or scheduling of persons to employment, it shall not act in a manner that is arbitrary, discriminatory or in bad faith.

Counsel argued that section 69 addresses only the acts or omissions of a trade union in the actual selecting, referring, assigning, designating or scheduling of persons to employment. While possibly relevant to an assessment of the propriety of referral conduct, in the respondent's submission an arbitrary, discriminatory or bad faith refusal by a union to give a member information about its referral conduct can not itself be a violation of the Act. Therefore, a complaint under section 69 must, in the respondent's submission, address referrals. The respondent also took the position that on such a complaint the Board should consider only those referrals which the complainants are able to identify with particularity.

10. These arguments may be usefully contrasted with the arguments of counsel for the trade union in *Donato Marinaro*, [1983] OLRB Rep. Oct. 1699. Mr. Marinaro alleged breach of section 69, basing his complaint on 46 referrals which had occurred between July 1981 and September 1982. That complaint had been filed April 28, 1983. Counsel for the respondent trade union (Labourers' International Union of North America, Local 1089) argued that Mr. Marinaro's delay in complaining of those matters should lead the Board to dismiss the complaint. The Board noted that:

8. As early as 1981, Mr. Marinaro was dissatisfied with the way in which Local 1089's hiring hall was being operated by the respondents. However, although he had heard rumours about improper referrals, he "couldn't prove anything" because the respondents would not permit him to examine the hiring hall records. Mr. Marinaro asked to see those records in November or December of 1981 but was refused access to them by Mr. D'Andrea. Although counsel for the respondents suggested to Mr. Marinaro in cross-examination that he was denied access to the hiring hall records because he wished to look at them on behalf of his son rather than on his own behalf, Mr. Marinaro steadfastly maintained that he wished to see them for his son and for himself. He further testified that he did not advise Mr. D'Andrea on whose behalf he wanted to examine the records. (In any event, *it is far from apparent to the Board that a request by a member of a local to view the local's hiring hall records on behalf of another member of the local, who is his son, can legitimately be denied.*) Although Mr. D'Andrea was in attendance at the hearing, he was not called to testify. Under the circumstances, we accept without hesitation or reservation Mr. Marinaro's evidence concerning his denial of access to the hiring hall records. In this regard, his experience appears to have been similar to that of other members of the Local...

9. Counsel for the respondent suggested that Mr. Marinaro should have investigated his suspicions by attending at job sites to see who was working and by attending at the Union hall to see who was being referred. However, assuming without deciding that such investigative efforts might legitimately be required in some circumstances, they would not have assisted Mr. Marinaro in the present case since he would not in any event have been able to determine whether such referrals were proper or improper without access to the hiring hall records. Mr. Minsky also contended that Mr. Marinaro should have filed a section 89 complaint based upon his suspicions and used such complaint to gain access to the hiring hall records. However, the Board does not find that contention to be meritorious. *The use of the Board's processes as a means of discovery in respect of allegations based upon mere suspicion is not something which the Board would desire to encourage* (although it may be necessary in some circumstances, such as in some cases to which the section 89(5) "reverse onus" applies). In any event, we are not satisfied that Mr. Marinaro knew or should have known prior to November of 1982 that effective access to the hiring hall records could be obtained in that manner. Furthermore, we are not inclined to give much weight to a protestation of delay in circumstances where, as in the present case, the inaccessibility of the information necessary to file a duly particularized complaint is created by improper conduct on the part of a party which seeks to raise the delay as a bar to hearing the complaint. (See paragraph 20 of the aforementioned *Portiss* decision in which the Board adopted a similar approach.)

(emphasis added)

In paragraph 15 of that decision, the Board also said:

We find no merit in Mr. Minsky's submission that Mr. Marinaro should have filed a section 89 complaint at that time on the basis of unconfirmed suspicions which he harboured (but, not unreasonably, felt incapable of proving).

It is noteworthy that the Board did not reject Mr. Minsky's contention that section 89 complaints could be used as a device to obtain the records necessary to investigate a suspected violation or pattern of violations of section 69. The Board merely ruled that it would not encourage that practice or, by ruling in Mr. Minsky's favour on the delay argument, effectively make that approach mandatory.

11. The question Mr. Wahl's argument begs is whether Mr. Marinaro, had he behaved as Mr. Minsky argued he should, would have been met by a demand from Mr. Wahl that his suspicions be fully particularized before the "discovery" could proceed, and that the discovery be limited to the matters particularized. In fairness to Mr. Wahl, he has not argued in this case that his clients can deny the complainants any records whatsoever and, at the same time, demand of them a high standard of particularity in formulating their complaint. Nevertheless, the assertion that section 69 affords the complainants no right to inspect hiring hall documents must seem to the complainants rather like "Catch-22". They read the *Portiss* case.

It dictated standards of record keeping and continuous disclosure expressly intended to prevent continued violation of section 69. Like Marinaro, the complainants in this case have unconfirmed suspicions of unfairness, fueled by a negative reaction to their request to inspect records. The message may seem to them to be that the Board will impose a set of rules giving them access to their union's records only after they prove wrongdoing which they feel cannot be confirmed or even discovered without first having the desired access to documents. Access to information is a means to an end. Are complainants entitled to the means only after they otherwise achieve the end?

12. It might be said that this is not the chicken and egg problem it appears to be. Record keeping obligations and inspection rights were imposed in the *Portiss* case in response to a demonstrated pattern of abuses and favouritism which had been able to flourish in a climate of secrecy maintained by the union's officers:

68. The facts in this case disclose that a screen has been raised between the general membership of Local 1089 and the day-to-day actions of its officers. Mr. D'Andrea and Mr. Iacobelli have wielded authority and discretion apparently without guidelines. They have, without any felt obligation to account to the membership made decisions in obvious disregard of the hiring hall rules as they are generally understood. In understanding those rules and the rules in relation to specialized classifications the members of Local 1089 have been left with no clear direction or map. When hiring hall rules are not clearly known and are administered from day-to-day without regard to consistency or any guiding principle, arbitrary and discriminatory treatment of the general membership is inevitable. The Board's remedy, therefore, is fashioned to remove the barrier between the union's officers and its general membership and to ensure, insofar as possible, that accountability is restored.

69. That can only be accomplished by opening decisions in relation to the administration of the hiring hall to regular scrutiny by the membership. This can in large measure be achieved by an order requiring the immediate discussion and adoption of hiring hall rules by the general membership and the permanent posting of those rules in the hiring hall, with copies to be provided to each member. Because the evidence establishes that the vagueness of the existing classification system has been the cause of much arbitrariness, the Board is satisfied that any remedial order must also address the establishment of a permanent system for the designation of classifications and standards governing the experience or ability of individuals to qualify within them. Provision should also be made for the fair treatment of members who, because of age or disability, are limited in the work they can perform. We are not impressed with suggestions that such refinements would be unduly onerous in the administration of the hiring hall. The existing registry system in the hiring hall is plainly inadequate for the proper classification and referral of the hundreds of labourers within Local 1089. Given the thousands of referrals, many of them with specialized qualifications, which the hiring hall is required to make, it may be that a computerized recording and recall system for the out of work list will be the most viable alternative to ensure

a fair administration of job referrals. While we do not see that as something which the Board should order, we feel it is a measure which the officers of Local 1089 should consider.

70. The evidence discloses a climate of fear among the general membership of Local 1089. Without commenting on whether that fear is justified, we are satisfied that the Board's remedial order should include some provision to allow the members of Local 1089 to obtain information on the day-to-day administration of the hiring hall without the necessity of a confrontation with Mr. D'Andrea. A transcript of the proceedings of a general membership meeting was adduced in evidence, having been covertly recorded by Mr. Portiss under the direction of the Ontario Provincial Police. It reveals, to say the least, a unique way of conducting a meeting. We are prepared to give considerable allowance for the less than parliamentary style to be expected in any meeting of rank and file labourers. Having said that, however, the Board must agree with the testimony of a number of witnesses that Mr. D'Andrea's method of conducting a meeting does not lend itself to a free flow of questions, much less to objections, from individual members. We are therefore satisfied that for a period of time the general membership should have the benefit of a third party retained to audit periodically the day-to-day administration of the hiring hall's records and procedures, and to report at regular monthly meetings to the general membership. The out of work list, including notations of all job referrals, as well as a parallel list of employers' requests for labourers should also be permanently posted and kept current in the hiring hall. If the hiring hall list is to be administered in good faith the referral out of order of employees should be readily identifiable by the general membership and members should be entitled to an explanation for such referrals. The permanent posting of the list and the appointment for two years of an auditor to scrutinize its administration, with regular reports to the membership, should begin the process of fuller information to members and alleviate their reticence to make inquiries.

It is important to note that in *Portiss* the Board did not prescribe the rules by which referral decisions were to be made. It directed only that the union properly establish, and then follow, such rules. The Board's requirement that various lists be maintained and kept available for inspection by members was in response to what the reader will understand was an unusual situation. The remedies imposed by the Board in the *Portiss* case do not represent a standard with which every trade union must in every case comply in order to satisfy its duty under section 69. The language of the Board in the *Portiss* case makes that clear; the Board would not otherwise have described its remedies as "far-reaching". The Board is not in the business of imposing hiring hall rules or dictating improvements to hiring hall administration, as appears from the following passage from the Board's decision in *John Cooper*, [1984] OLRB Rep. Jan. 6:

40. This is not to say that we are entirely happy about the way in which the hiring hall is operated. The union's record-keeping procedures leave

something to be desired and the heavy reliance on the [business manager's] memory creates a real potential for error. There may be up to 100 unemployed members on the list at any one time, and it will obviously be difficult for [the business manager] to remember the qualifications, preferences and circumstances of each one of them. An honest error may not be illegal but the union should still make every effort to reduce the potential for error and the possibility that members may *think* they have been dealt with unfairly. Unless the union's hiring hall rules and the factors which [the business manager] takes into account are reduced to writing and regularly explained to the membership so that there can be no excuse for misunderstanding, suspicions are bound to arise fueling dissension in the Local and potentially costly and unnecessary litigation. Equally important, if members are not fully aware of the criteria which might support their claim for a job referral, they may fail to communicate their situation to [the business manager] and, in consequence, remain out of work longer than might otherwise be the case. However, it is one thing to suggest that the system could be improved or that more effort should be made to educate the membership. It is quite another to suggest that the existing system, endorsed by the membership, is illegal, or that [the business manager] himself has acted improperly and in contravention of section 69 of the *Labour Relations Act*. We do not think that the evidence supports either proposition.

13. All of this establishes only that behaviour might not violate section 69 even if that behaviour creates the suspicion that violations have occurred; it does not answer the question whether a refusal of information can be a violation of section 69. In the context outlined earlier, the view that members have no right to any information has unsatisfactory consequences for those who wish to be satisfied that they are being treated fairly. It obliges them to publicly accuse their own officials of wrongdoing before they can determine for themselves whether wrongdoing has occurred. However, the interpretation contended for by the respondent is not grammatically compelled by the language of section 69. The phrase "engaged in the selection, referral, assignment, designation or scheduling of persons to employment" describes the sort of trade union to which section 69 applies. The section says that that sort of trade union "shall not act in a manner that is arbitrary, discriminatory or in bad faith". If the Legislature had meant "act" to refer only to the "selection, referral, assignment, designation or scheduling of persons to employment", it could have employed the words "so act" or "do so" in place of "act", or otherwise made the limitation clear. To what acts does the duty apply, then? It might be argued that a failure to connect the word "act" with the actions enumerated in identifying the actor will cast the word's meaning adrift, allowing it to focus on anything from union politics to the union's dealings with those who supply its pencils and paper. The section's historical antecedents, however, both favour the broader interpretation and make sense of its limits. Those antecedents include section 68 of the Act, this Board's decision in *Arthur Joseph Roberts*, [1974] OLRB Rep. March 169, and the *Report of the Royal Commission on Certain Sectors of the Building Industry* in December, 1974 (the "Waisberg Report").

14. Section 68 of the Act provides:

A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a

manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

The origins of the section and the principles which guide its application are the subject of extensive Board jurisprudence and scholarly analysis (see, for example, *Ontario Hydro* [1975] OLRB Rep. May 444; *Savage Shoes Ltd.* [1983] OLRB Rep. Dec. 2067; Raymond E. Brown, "The 'Arbitrary', 'Discriminatory' and 'Bad Faith' Tests Under the Duty of Fair Representation in Ontario", (1982) 60 Can. Bar. Rev. 412; and Richard M. Brown, "Toward a General Theory of Fair Representation in Contract Administration" in Swan & Swinton, *Studies in Labour Law* (1983, Butterworths) at page 177). A detailed exploration of those matters will not be repeated here. It is sufficient to note that the "duty of fair representation", which evolves by necessary implication from the restraints of section 68, speaks to a trade union's behaviour as agent for employees in dealings with their employer. A union's conduct of its own business and internal proceedings become the focus of section 68 only if and to the extent that they affect the representation of individuals in matters involving their employment. In March 1974, this Board concluded in *Arthur Joseph Roberts*, *supra*, that the language of section 68 was ineffective to extend these duties to a relationship between a union operating a hiring hall and its unemployed members:

17. Would the Board therefore be on a sound footing in granting relief to persons who are not employees for purposes of section 60 of the Act? In this regard the Board has come to the conclusion that it would do violence to the intent of the Legislature if it presumed that members of a trade union affected by a union hiring hall are "employees in a bargaining unit" for purposes of supervising the operation of that hiring hall through the union's alleged duty of fair representation.

18. We are satisfied that it was the intention of the Legislation to restrict the scope of a trade union's duty of fair representation to employees in a bargaining unit. It would be a forced interpretation of the word employee in section 60 for the Board to presume the contrary where the Legislature permits parties to the collective bargaining relationship under section 39(1)(a) of the Act to determine through negotiation the very conditions upon which the employer-employee relationship may be established. It is the Board's opinion that if the Legislature intended the scope of the trade union's duty of fair representation to extend beyond employees in the bargaining unit it would have done so in the clearest of language. The Legislature has given the Board a clear mandate with respect to granting relief against discriminatory hiring practices based on trade union activity. It has not done so for purposes of section 60

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20. The Board holds that under section 60 a trade union's duty of fair representation does not extend to members in good standing who are not employees in a bargaining unit.

In December, 1974, His Honour Judge Waisberg expressed concern at this result, and discussed the need of members for access to hiring hall records (The Waisberg Report, *supra*, at pp. 327-328):

In the construction industry the employees do not enjoy the security of employment that is found in other industries. The only permanent relationship is that established with the union. It is understandable that the unions would wish to provide their members with a system of hiring that would provide maximum job security. But privileges and obligations go together. The only opportunity for a tradesman to find work might be through his respective union and hiring hall: if a work application by a qualified tradesman is not accepted, that tradesman is denied his right to work. Section 38 [now 46] of the *Labour Relations Act* provides some protection for employees, and section 60 [now 68] provides for fair representation of employees by the union. But what about the person who is still seeking to become an employee? In a case before the Ontario Labour Relations Board, *A. J. Roberts and Plasterers Union Local 49* (File No. 4715-73-U, dated 20 March 1974), it was held that the scope of a trade union's duty of fair representation was restricted to employees in a bargaining unit. Equally, the opportunity for an employer to find workmen would be through the union and hiring hall. There must be some assurance that he will be treated fairly. I do not feel that a case has been made for removing the hiring hall from union control. But, in view of the fact that the operation of hiring halls by unions with closed shop collective agreements places them in a position of complete monopoly, it would seem to me that some form of public inspection would be justified. The records should at all times, be available to the union members, the employers and the inspectors. There was a favourable response by a few unions appearing before the Commission to some degree of public supervision. It may prove sufficient in correcting some of the abuses. Further investigation and consideration are warranted.

Section 60a, now section 69, was then enacted by the Legislature, and came into effect July 18, 1975 (s.o. 1975, c. 76, s. 16). All this preceded the broader purposive interpretation later given to "employee" in hiring hall situations by the Ontario Court of Appeal in *Re Blouin Drywall Contractors Ltd. and United Brotherhood of Carpenters and Joiners of America, Local 2486*, (1975) 8 O.R. (2d) 103, and the Supreme Court of Canada in *International Longshoremen's Association et al. v. Maritime Employers' Association et al*, [1979] 1 S.C.R. 120. If the scope of section 69 is narrower than the scope section 68 would have if "employees in the unit" were given a similar interpretation, then the Board would be obliged to consider whether *Roberts* was correctly decided. Any current question of the correctness of that decision does not, however, affect the analysis presented here.

15. The language and history of section 69 suggest that the actions with which that section is concerned must be actions analogous (at least so far as the analogy can be drawn) with the actions to which section 68 is directed: actions in matters affecting the employment of persons the union represents. The duty will have different elements and will apply to different sorts of actions, however. The kind of union to which section 69 applies has a much greater control over the employment of the persons to whom the duty is owed and the employment

relationships which result from the operation of a hiring hall are often very different from those in respect of which the section 68 duty usually applies. However, sections 68 and 69 both have at their root principles from which the duty of fair representation which was judicially and administratively elaborated by the Courts and the NLRB in the United States. The NLRB's reasoned elaboration of those principles has led it to conclude that the unjustified refusal of a trade union operating a hiring hall to supply job referral information in response to a manageable request violates the union's duty of fair representation: *Local No. 324, International Union of Operating Engineers, and Melvin Carlson*, 226 NLRB 587. The Administrative Law Judge noted in that case (at pp. 598-599):

...where an employee seeks information from his collective-bargaining agent in a 'matter affecting his employment,' and the Union establishes on the record no arguably reasonable basis for refusing to supply that information, I must conclude that the Union's conduct is arbitrary.

A union is a service agency, designed to further the interests of the employees it represents. There is no reason for it to be a closed society, unresponsive to reasonable requests of the unit employees. As the Court of Appeals for the District of Columbia Circuit noted in *I.U.E., Frigidaire Local 801 v. N.L.R.B.*, *supra*, 307 F.2d at 683 (per Burger, J.), a union, as the agent of employees, is subject to the positive obligation set forth in Restatement (Second), *Agency* 381 (1958): 'to use reasonable efforts to give his principal information which is relevant to affairs entrusted to him and which, as the agent has notice, the principal would desire to have.'

16. At the hearing of February 23, 1984, the Board indicated it was not prepared to rule that a refusal of information could not be a breach of section 69. On further reflection, the Board is now satisfied that a refusal of information *will* be a violation of section 69 *if* the refusal is arbitrary, discriminatory or in bad faith. This is so whether or not the information sought would have revealed some other violation of section 69. This does not mean that a union must comply with any and every request for information, regardless of the scope of the request, the sensitivity of the information sought, or its relevance to the interests of the person making the request. That person's interests must be balanced against the individual and collective interests of the other persons for whom the union seeks employment opportunities. *Prima facie*, however, such individuals have a legitimate interest in knowing both the results of referral decisions and the information taken into account in making those decisions. The strength of that interest, and of any competing interests, will depend on the facts. It is for the trade union to strike the necessary balance. The Board's approach to a complaint that the result is improper will be the same as in other cases under sections 68 and 69: the onus will be on the complainant to show that the trade union's action is arbitrary, discriminatory or in bad faith.

17. Section 69 of the *Labour Relations Act* imposes a duty on certain trade unions. Strictly speaking, only a trade union can breach that duty. Of course, a trade union acts only through its officers and agents. Their acts and omissions are the acts and omissions which determine whether the section has been contravened. The actor himself is not, however, an appropriate named respondent in a complaint alleging contravention only of section 69 of the

Labour Relations Act. There is no allegation here that Mr. Lewis has violated any other section of the *Labour Relations Act*. Accordingly, the Board ruled orally at the hearing that the phrase “and Jimmie Lewis, Business Manager and Secretary-Treasurer” should be deleted from the style of cause in this complaint. As the Board made plain at the hearing, however, by deleting his name from the style of cause the Board is neither approving nor disapproving of anything Mr. Lewis is alleged to have done in the course of his duties as an official of the respondent trade union. This ruling reflects only the fact that no remedy would be awarded against Mr. Lewis personally even if, by his actions, he has caused the trade union to violate section 69 of the Act.

18. Counsel for the respondent argued that the Board should defer to processes available to the complainants under the constitutions of the respondent Local Union, the District Council of which it is a member and the parent International Union. The complainants have not initiated any such process, nor do they wish to do so. A similar argument was made, and rejected, in *Ontario Hydro*, [1980] OLRB Rep. July 1039. In that case the Board noted that it would not, in any event, dismiss a complaint in deference to a union’s constitutional processes. At most, deference would result in the Board retaining jurisdiction to assure that the outcome of that process was an adequate resolution of the subject matter of the complaint filed with the Board. In *Ontario Hydro* the Board was not satisfied that the respondent’s constitutional process would have been as expeditious as the Board’s, nor could the Board be satisfied that adequate relief would be available under the union’s constitution. In *The International Association of Bridge, Structural and Ornamental Ironworkers*, [1982] OLRB Rep. Feb. 233, the Board highlighted some other considerations which must be kept in mind in assessing a request for deferral to other proceedings:

8. In the absence of any allegations that arguably constitute a breach of the *Labour Relations Act*, the propriety of a trade union’s behaviour vis-a-vis its members is governed by its constitution and by-laws, and the procedural remedies which these provide, subject to the controlling supervision of the courts (see *Operative Plasterers’ and Cement Masons’ International Association of the United States and Canada, Local 48*, [1974] OLRB Rep. March 169). However, in *Canadian Textile Union*, [1971] OLRB Rep. Aug. 470, the Board referred to the expectation of the Legislature that the Board is the more appropriate forum to adjudicate upon the matters of public policy which find expression in the *Labour Relations Act*, in support of its unwillingness “to accede to the ‘contract theory’, which indicates that members of a trade union may have contracted to exhaust their rights within the internal trade union machinery before resorting to this Board, where the issue *prima facie* indicates a violation of public policy”. In that case, the Board declined to defer to the union’s internal procedures where it was alleged that the grievor had been removed from office as president of a local of the International Chemical Workers by certain officials of the International contrary to the predecessors of what are now sections 3, 70, and 80 of the Act. (See also *Imperial Tobacco Products (Ontario) Limited*, [1974] OLRB Rep. July 418.)

In his argument, counsel for the respondent referred to a number of provisions of the International, District Council and Local constitutions. The Board was not persuaded that the processes referred to therein afforded either substantive or remedial jurisdiction adequate to enforce

the rights contended for by the claimants here. Accordingly, the Board ruled orally that it would not defer, or force the complainants to defer, to internal union procedures.

19. The respondent also argued that the complaint before the Board is insufficiently particular. He referred to Rule 72 of the Board's Rules of Procedure, which provides as follows:

72.-(1) Where a person intends to allege, at the hearing of an application or complaint, improper or irregular conduct by any person, he shall,

- (a) include in the application or complaint; or
- (b) file a notice of intention that shall contain,

a concise statement of the material facts, actions and omissions upon which he intends to rely as constituting such improper or irregular conduct, including the time when and the place where the actions or omissions complained of occurred and the names of the persons who engaged in or committed them, but not the evidence by which the material facts, actions or omissions are to be proved, and, where he alleges that the improper or irregular conduct constitutes a violation of any provision of the Act, he shall include a reference to the section or sections of the Act containing such provision.

(2) Where, in the opinion of the Board, a person has not filed notice of intention promptly upon discovering the alleged improper or irregular conduct, he shall not adduce evidence at the hearing of the application of such facts, except with the consent of the Board and, if the Board deems it advisable to give such consent, it may do so upon such terms and conditions as it considers advisable.

(3) Where a statement in an application or complaint or in any document filed under these Rules in respect of the application or complaint is so indefinite or incomplete as to hamper any person in the preparation of his case, the Board may, upon the request of the person made promptly upon receipt of the application, complaint or document, direct that the information stated be made specific or complete and, if the person so directed fails to comply with the direction, the Board may strike the statement from the application, complaint or document.

(4) No person shall adduce evidence at the hearing of an application or complaint of any material fact that has not been included in the application or complaint or in any document filed under these Rules in respect of the application or complaint, except with the consent of the Board and, if the Board considers it advisable to give such consent, it may do so upon such terms and conditions as it considers advisable.

This Rule was brought to the attention of the complainants in this case not only by the correspondence of counsel for the respondent, but also by the form they completed when they

first filed their complaint (see paragraph 4 of Form 58, and Note 3 referred to in that paragraph).

20. As noted by the Board in *Guaranteed Insulation '77 Limited*, [1981] OLRB Rep. Oct. 1394, at paragraph 12:

... the purpose of particulars is to ensure a fair hearing by avoiding prejudice, delay or embarrassment to the opposing parties by enabling them to know in advance what case they have to meet at the hearing. Particulars reduce the risk of opposing parties being taken by surprise and enable them to prepare for cross-examination of the witnesses called by the party alleging the improper or irregular conduct. Particulars also assist opposing parties to determine what witnesses they will need to have available in rebuttal. The *Racine* case [*Racine, Robert and Gauthier Reg'd*, [1978] OLRB Rep. June 559] ... provides the following examples of considerations that are relevant in ruling on the sufficiency and adequacy of the particulars provided by an applicant:

- (1) Whether the allegations substantially identify and describe the offences alleged and indicate the acts or omissions and the time when and place where they occurred and give the names of the persons who committed or engaged in them;
- (2) The knowledge or availability of knowledge possessed by the parties of the circumstances and details of the alleged violations;
- (3) Whether the language of the allegations and the absence of certain particulars are likely to mislead, confuse or cause real prejudice to the opposite party in the preparation of its defence;
- (4) Whether additional particulars sought or demanded are merely descriptive of the evidence by which they are to be proved rather than of the acts or omissions and the time when and place where they occurred and the names of the persons who engaged in or committed them;
- (5) The nature and circumstances of the violations alleged;
- (6) Whether particulars demanded are likely to be required by the party demanding them for the *bona fide* purpose of preparing his defence or whether they are more likely being demanded solely as a technical matter for the purpose of harassing and embarrassing the applicant and to create delay in the disposition of the application.

Having regard to these considerations, the allegations in the Complaint under “other relevant statements” (recited in ¶2, *supra*) clearly violate Rule 72. However, three or four of the referrals mentioned in Mr. Bradley’s letter of December 16th seem adequately particularized.

Indeed, the respondent said it was prepared to deal with allegations relating to all eight of the names referred to in the passage of that letter which is quoted above in paragraph 4 of this decision. The refusals of information alleged in the complaint and subsequent correspondence of Mr. Bradley also seem to be adequately particularized. However, it was quite apparent from Mr. Bradley's submissions that the complainants wanted the Board to deal with a number of referrals about which they had suspicions or incomplete information, and that the totality of their *existing* knowledge and suspicions with respect to those referrals had not yet been set out in material filed with the Board or provided to the respondent. The respondent's argument was that the complainants had not taken advantage of the documentation made available by the respondent. They had not, he said, done their "homework". Such lazy complainants, he argued, should not be permitted to proceed with their complaint. Apart altogether from any positive obligation to investigate, Rule 72 requires at least that the complainants set out with as much precision as possible the facts they already know (or suspect) about the matters they wish to put before the Board. There seemed no point proceeding with a hearing limited to considering only the allegations which had been adequately particularized, when it was apparent that that would not deal with all of the complainants' concerns, and might well result in the filing of another complaint to deal with the additional allegations which the complainants were capable of more fully particularizing. Equally, there seemed no point in dismissing the complaint for lack of particularity, only to have the complainants file another complaint in which the parties and the Board would have to repeat preliminaries already completed in the processing and initial hearing of this complaint. For those reasons, the Board directed orally that the complainants file particulars in accordance with Rule 72, and adjourned this complaint *sine die* pending compliance with that direction. The Board indicated that it would not and, indeed, could not specify in advance the degree of detail necessary in the particulars to be filed. The Board also expressly declined to impose any particular time limit on the filing of particulars or to limit in advance the time frame which those particulars could cover. With respect to both of those issues, the Board noted the effect delay might have on the consideration of allegations, but also noted that that effect was a function of the nature of the allegation as well as the delay in asserting it. The Board did note, however, that pursuant to Practice Note No. 14, the complaint would be terminated if not rescheduled for hearing within a year. The Board said its direction to the Registrar would be that this complaint could not be rescheduled for hearing at the request of the complainants in the absence of purported compliance with its direction to supply particulars. No such limitation would apply to a request by the respondent, and the respondent's right to request re-listing could be employed by the respondent if so advised, to have the Board deal with any problems which arise out of delayed compliance with the Board's direction to deliver particulars.

21. The Board also expressly declined to rule that allegations with respect to referrals would only be entertained if the person allegedly referred was, at the time of the referral, listed below one or more of the complainants on the out-of-work list. That argument assumes that, under the rules which the respondent applies or ought to apply in the operation of its hiring hall, a member never has a greater right to any particular work than someone "above" him on the out-of-work list. None of the parties has indicated what rules they think are applicable in the operation of this hiring hall. There has been some mention of job classifications or specialties. If special qualification or experience with respect to the particular work offered is one of the criteria applied in making a referral, then the referral of an unqualified or inexperienced person farther up the list could be relevant to an assessment of losses suffered by a qualified complainant farther down the list. In any event, the existence of improper referrals which do not deprive a named complainant of work opportunities may be relevant both

to an assessment whether behaviour which does affect the complainants is arbitrary, discriminatory or in bad faith and to an assessment of the appropriate remedy.

22. It should be made clear that in ordering the complainants to supply further particulars, the Board has not adopted the respondent's argument that the complainants have been lazy or that they are obliged to review all the out-of-work lists available to them and extract from them all the particulars which might be extracted before they can again pursue their complaint. The complainants say that the out-of-work lists are not particularly useful in determining what has actually happened. By implication, the respondent argued that those lists are useful for that purpose. The Board cannot choose between those competing contentions without hearing evidence. When the complainants deliver their further particulars, there may again be an issue whether the particulars are adequate, having regard to the tests recited in paragraph 20 of this decision. Having said that, the Board wishes the complainants to understand clearly that it is for them, and not the Board, to identify improper referrals, if there are any. The respondent has said that relevant information is available. It has made an undertaking to supplement that information with more detail if any particular referral is questioned. The complainants would be well advised to take advantage of those opportunities.

23. Accordingly, the Board confirms the following directions and orders made orally at the hearing of February 23, 1984 in this matter:

- (a) the name "Jimmie Lewis, Business Manager and Secretary-Treasurer" is deleted from the style of cause herein;
- (b) the hearing of this complaint is adjourned *sine die*;
- (c) the complainants are directed to file with the Board a written statement of the material facts, actions and omissions on which they intend to rely as constituting improper or irregular conduct, in compliance with Rule 72 of the Board's Rules of Procedure. By way of clarification, the written statement of particulars to be filed pursuant to this direction should include particulars of all of the allegations on which the complainants intend to rely on, including allegations already made in filings to date.

24. Upon receipt from the complainants of a written statement of allegations purporting to comply with the Board's direction in the next preceding paragraph, or at the request of the respondent, the Registrar shall relist this matter for hearing in Sault Ste. Marie after consulting the parties or their representatives.

2805-83-R David Tiburcio, Applicant, v. Service Employees Union, Local 204, Respondent, v. **Don Mills Foundation For Senior Citizens Inc.**, Intervener

Practice and Procedure – Termination – Four of seven present employees signing petition – Arbitration completed and award pending with respect to 13 discharged employees – Whether petition having adequate support depending on outcome of arbitration – Board deciding to await outcome of arbitration

BEFORE: Richard M. Brown, Vice-Chairman, and Board Members P. Grasso and F. C. Burnet.

APPEARANCES: *David Tiburcio and Fortiny Pavlakis for the applicant; H. Goldblatt, E. Poskanzer, E. Laliberte and D. Anderson for the respondent; Michael Gordon and Jean Joy for the intervener.*

DECISION OF THE BOARD; April 19, 1984

1. This is an application under section 57(2) of the *Labour Relations Act* to terminate bargaining rights.

2. The respondent is currently the bargaining agent for a unit comprised of all employees of the Don Mills Foundation For Senior Citizens, Inc. at Thompson House Home For The Aged in the City of North York, save and except registered nurses, physiotherapists, occupational therapists, supervisors, persons above the rank of supervisor, office staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period. The application (which was filed on March 1, 1984) is timely; the applicant is an employee in the bargaining unit.

3. Four of the seven employees now at work signed the petition submitted by the applicant. The only matter in dispute is the standing of thirteen persons whose employment was terminated in March of 1983 when the employer subcontracted the job functions previously performed by them. The union grieved the subcontracting and the grievance was the subject of a lengthy hearing before a board of arbitration; the award has not been handed down at the date of writing.

4. Has the applicant met the forty-five per cent test laid down in section 57(3)? :

Upon an application under subsection (1) and (2), the Board shall ascertain the number of employees in the bargaining unit at the time the application was made and whether not less than 45 per cent of the employees in the bargaining unit have voluntarily signified in writing at such time as is determined under clause 103(2)(j) that they no longer wish to be represented by the trade union, and, if not less than 45 per cent have so signified, the Board shall, by a representation vote, satisfy itself that a majority of the employees desire that the right of the trade union to bargain on their behalf be terminated.

The union contended the answer was no if the grievance succeeded and yes if it failed; in short, a definite answer must await the arbitration award. The employer urged us to apply the 30/30 rule. As a general rule, people not at work on the day an application is filed are viewed as employees on that date if, and only if, they worked during the thirty day period preceding the application and worked (or are expected to work) during the thirty days following the application. This rule applies to those absent by reason of illness, vacation or layoff in accordance with a collective agreement. Under the 30/30 rule, the individuals in question would be excluded from the count, regardless of the outcome of the arbitration proceedings.

5. The people terminated by the employer in March of 1983 ought to be treated as employees on the date the application was made if they are reinstated by the arbitration board. We rest this conclusion upon section 1(2):

For the purposes of this Act, no person shall be deemed to have ceased to be an employee by reason only of his ceasing to work for his employer as the result of a lock-out or strike or by reason only of his being dismissed by his employer contrary to this Act or to a collective agreement.

This section is most often applied in the context of an unfair labour practice discharge. When a person is fired prior to an application for certification and a trade union alleges an anti-union motive, the Board adjudicates the discharge complaint; if it succeeds, the individual is treated as an employee on the date of the application, by virtue of section 1(2). In other words, the 30/30 rule is not applied. See *Otis Starr Limited*, [1967] OLRB Rep. Mar. 965; *Modern Cabinet Industries of Ottawa Limited*, [1970] OLRB Rep. Apr. 39; and *Drummond McCall & Co.*, [1976] OLRB Rep. Dec. 835. In this setting, to exclude the discharged employee from the count would be to allow the employer to rob a trade union and its supporters of their entitlement under the Act – either a vote or certification without a vote, depending upon the circumstances – by engaging in illegal conduct. This case at hand is analogous; to ignore the terminated employees would be to deprive them of their right to oppose the holding of a representation election.

7. The Registrar is directed to relist this matter for hearing when the arbitration award is released.

2283-83-U Ontario Public Service Employees Union, Applicant, v. Dr. G. J. Bissett and The Board of Governors of Fanshawe College of Applied Arts and Technology, Respondents

Colleges Collective Bargaining Act – Consent to Prosecute – Interference in Trade Unions – College restructuring Academic Committee's terms of reference to include areas relating to faculty – Consultation with individuals in areas within management rights not interference in context of education institute – Memo by college within freedom of expression proviso – Posting of grievance on bulletin board imprudent but not breach – No prima facie case – Consent denied

BEFORE: R. D. Howe, Vice-Chairman, and Board Members F. W. Murray and L. C. Collins.

APPEARANCES: *Michael Pratt and Mike Grunwell for the applicant; W. J. Hayter, G. J. Bissett and P. T. Myers for the respondents.*

DECISION OF R. D. HOWE, VICE-CHAIRMAN, AND BOARD MEMBER F. W. MURRAY; April 16, 1984

1. This is an application to the Board under section 89(6) of the *Colleges Collective Bargaining Act* (the "Act") for consent to institute a prosecution of the respondents for alleged violations of section 75(1) of the Act, which provides:

No person who is acting on behalf of the Council or an employer shall participate in or interfere with the selection, formation or administration of an employee organization or the representation of employees by such an organization, but nothing in this section shall be deemed to deprive the Council or an employer or any person acting on behalf of the Council or an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.

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3. Paragraph 4 of the application reads:

The material facts upon which the applicant intends to rely as establishing the offence are as follows:

- (A) In September, 1983, the terms of reference of the Academic Committee were modified in such a way as to include Bargaining issues.
- (B) Memos dated October 17, 1983 and November 2, 1983 from G. J. Bissett to M. Grunwell.
- (C) Memo dated December 13, 1983 from G. J. Bissett to M. Grunwell with copies to S. O'Flynn, H. Rawson, W. J. Pillsworth, A. D. White and Members of the Academic Committee.

(D) Employer grievance dated December 15, 1983 and signed by G. J. Bissett.

(E) The subsequent public posting of the said Employer grievance.

4. In his opening statement on behalf of the applicant, O.P.S.E.U. Staff Representative Michael Pratt advised the Board that the applicant had found it necessary to seek consent to prosecute instead of filing a section 77 complaint because the Board's jurisdiction to inquire into a complaint under that section does not extend to alleged contraventions of 75(1).

5. The applicant holds bargaining rights for all academic employees at the Colleges of Applied Arts and Technology covered by the Act, including Fanshawe College of Applied Arts and Technology (the "College"). Its most recent collective agreement with the Ontario Council of Regents for Colleges of Applied Arts and Technology is effective from September 1, 1982 to August 31, 1984. That agreement is negotiated on a province-wide basis and applies to all the colleges covered by the Act.

6. An Academic Committee (also referred to in this decision as the "Committee") has been in existence at the College for a number of years. At all material times its mandate has been to review and provide recommendations to the College Administration concerning matters of general policy and procedure relating to the academic processes of the College, including evaluation of academic programs, courses, student achievement, College (academic) services, and faculty; recruitment of students and placement of graduates; concepts of teaching/learning and curriculum design; collection, storage, and retrieval of academic data; and other matters having an impact on the academic process, such as the conduct of faculty or students, the use of classroom facilities, and scheduling. Mike Grunwell, who was the President of the applicant's Local 110 at all material times, testified that there has been a "longstanding history" of labour relations problems at the College. He identified one of the irritants in the relationship between Local 110 and the College as being the fact that since 1975 the terms of reference of the Academic Committee have included general policy and procedure concerning conduct of faculty, evaluation of faculty, and student complaints concerning faculty conduct. It was Mr. Grunwell's view that if the College wished to obtain input concerning faculty members' views in respect to those matters, it should do so through their bargaining agent. Although he had expressed some concern to the College about the situation prior to the fall of 1983, no grievance, complaint, application for consent to prosecute, or other action was ever initiated.

7. In June of 1983 Gerald Bissett became the Vice-President (Academic). Prior to accepting that appointment, Dr. Bissett had held a number of other educational administrative positions, including an academic vice-presidency at a Montreal community college. As Fanshawe College's Vice-President (Academic), Dr. Bissett's responsibilities included chairing the Academic Committee. During the summer of 1983, he reviewed the Committee's terms of reference and discovered that 58% of the voting power on the Committee was in the hands of the College's Administration, with 38% being held by elected faculty members, and the remainder by students. Since that ran counter to his "philosophy of consultative process within an academic institution", he decided to recommend that the Committee's terms of reference be changed "to give more say to the faculty and students, and less to the administration". Accordingly, he drafted for consideration by the Committee (and the administration) revised

terms of reference which provided for 35 voting members, of whom 18 would be (elected) faculty members. (He also recommended that the terms of reference be changed to specify the Vice-President (Academic), rather than College President, as the member of the Administration to whom the Committee would make recommendations for the establishment of College academic policies and procedures.) During the last week of August and the first three or four weeks of September, Dr. Bissett met with members of the Committee individually and in small groups to explain the proposed changes in the Committee's terms of reference and develop a rapport with the faculty. Unfortunately, he did not consult with Mr. Grunwell or any other Union official concerning the proposed changes. While it was not suggested that his failure to consult with the Union breached the Act or the collective agreement, it appears to us to have been an error in judgment which did little to endear him to Mr. Grunwell.

8. The revised terms of reference were discussed at the September 28, 1983 meeting of the Committee and were tabled to the following meeting, which was held on October 12, 1983. At that meeting, Dr. Bissett reassured Committee members that the revised terms of reference did not encompass the evaluation of individual faculty members, but only the principles and instruments to be used in evaluation procedure. Following a discussion of the matter, a motion was passed recommending to the College President that the Committee's existing terms of reference be replaced by the revised terms of reference.

9. On October 13, 1983, Dr. Bissett received the following memo (dated October 12, 1983) from Mr. Grunwell:

One of the most vexatious practices of the college over the years has involved repeated attempts by senior administration to undermine the sole authority of the Ontario Public Service Employees Union to speak on behalf of members with respect to terms and conditions of employment. A favourite ploy was to establish alternative structures (usually committees) through which input from a non-representational group of our members was solicited. Since these vehicles were not sanctioned by Local 110 and the individuals were not authorized to speak on behalf of the bargaining agent, the process was entirely improper and represented a completely unlawful attempt to make an "end run" around the duly recognized bargaining agent.

The union considered such practices as intolerable and reacted accordingly. In recent years, Mr. Rawson has recognized that such "Colvin-esque" practices are counterproductive and has repeatedly assured the Local 110 that they would not be repeated during his incumbency as President.

Notwithstanding the foregoing, we understand that there are proposals afoot to amend the terms of reference of the Academic Committee to include:

Sect.6

b) "Evaluation of programs ... AND FACULTY".

f) “Other matters such as the CONDUCT OF FACULTY ...”.

(Emphasis added)

Clearly these issues involve terms and conditions of employment. As such they fall within the exclusive jurisdiction of the lawful bargaining agent.

We must therefore advise that persons elected to the Academic Committee are not empowered by OPSEU to represent members on terms and conditions of employment and will do so at their peril. Similarly any attempt by management to discuss and/or arrive at agreements with such persons will be viewed as a wilful provocation since it will involve a refusal to recognize the sole authority of the bargaining agent to speak on behalf of members.

Mr. Grunwell also arranged for a copy of that memo to be forwarded to each of the faculty members on the Committee, and to the College President. Dr. Bissett replied as follows in a memo dated October 17, 1983 (which was also copied to the faculty members on the Committee and to the College President):

Please be assured that I will be pleased to answer your memo of 1983 10 12 on receipt of the definition of the word “peril” as referred to in the first sentence of the last paragraph thereof.

10. That memo in turn generated the following reply, the sarcastic tone of which clearly indicates that Dr. Bissett is not the only individual censurable for errors in judgment in respect of this matter:

I note your request of Oct. 17 for a definition of the word “peril”. I am not so presumptuous as to believe that I can improve on that contained in the Oxford English Dictionary; therefore, I refer you to that source for your further enlightenment.

It may be that your communication was intended to discover the nature of the peril rather than the definition of “peril”. It remains our position that those who undermine or allow to be undermined the authority of their union on bargainable issues are, indeed, at peril. The precise nature of the peril and the steps which might be taken to combat that peril are concerns internal to the union, which concerns I will discuss with union members should the need arise.

That memo led Dr. Bissett to conclude that “war had been declared”. He “took the opening comment as a snarky and totally unprofessional remark”, and concluded that, since he was new to the College, the system, and the province, “an operation had been started to test the new boy on the block”. In addition to providing copies of that memo to the faculty members on the Committee, Mr. Grunwell also sent them a separate memo (dated October 24, 1983) concerning the Union’s position.

11. On November 2, 1983, Dr. Bissett forwarded the following memo to Mr. Grunwell and to each of the members of the Academic Committee:

In response to your memorandum of October 12, 1983, and following reception of your reply to my communication of October 17, I must first indicate my surprise vis-a-vis the points you are making. In fact, the entire contents of the former seem to revolve around a misconception on your part:

“... We understand that there are proposals afoot to amend the terms of reference of the Academic Committee to include Section 6

(B) ‘Evaluation of programs ... AND FACULTY’

(F) ‘Other matters such as the CONDUCT OF FACULTY ...’

In reality, as I carefully pointed out to members of the Academic Committee in my meetings with them, not one iota has been changed in either section 3 or 6.

I, consequently, am perplexed as to your seeming agitation upon discovering the wording in Sections 6B and 6F when such has been the case for quite some time now with no previous (to my knowledge) difficulties arising in consequence of that wording.

Quite apart from the aforementioned objection of yours, I am very concerned about your perceptions as to how the College should be operated. It would seem that you consider only individuals specifically appointed by OPSEU can discuss with the Administration any point which can have an impact on the Faculty’s working conditions.

Unfortunately, that perspective seems rather simplistic in concept and unrealistic in approach. In fact, most, if not all, aspects of College life can be said to have, to a greater or lesser degree, some influence on one’s working conditions. Thus, scheduling, budgeting, allocation of classrooms, etc. etc. would have to be discussed only with those appointed by the Union and, presumably, only in one forum – the College Committee. Totally impractical!

In addition, while you seem to suggest that all issues should be dealt with from one perspective – the Collective Agreement, I would submit that there is another very important element – *pedagogical viability*!

I would concur that decisions cannot be taken without, at some point in the deliberations, having considered the Collective Agreement. By the same token, no decisions should be finalized unless the financial implications have been scrutinized. But, surely one can nevertheless discuss professional issues from an academic point of view! While it might seem blasphemous to you, the reality is that Fanshawe College does *not* exist

because of its employees but because there is a student clientele which has needs and deserves to have those needs addressed professionally.

Faculty evaluation, like all other types of evaluation, is an important part of how an educational institution attempts to verify its effectiveness. As such, it seems eminently sensible to have the Academic Committee deal with the philosophy and the instruments associated with evaluation.

Perhaps your fears might be assuaged somewhat if I remind you that it has been the practice of the Administration to consult with OPSEU prior to any change being made in the evaluation process.

As Vice-President (Academic), I am responsible for ensuring academic integrity within the parameters established by the Collective Agreement and the budgetary constraints. I can attempt to accomplish this in two ways:

1. Sitting in my ivory tower on Mahogany Alley

OR

2. Consulting with a variety of individuals or groups interested in the various issues associated with academic excellence.

I would submit that the latter is a more intelligent approach and will result in a greater number of well-informed decisions. Towards this end, I have recently suggested and, subsequently, received approval for changes in the Terms of Reference of the Academic Committee whereby the faculty members are given a majority of votes, the students' power is greatly enhanced and the Administration alters its role to one of making decisions *after* the necessary input has been received. The point is, I NEED to know how the faculty and students feel and why they think along certain lines. I, consequently, strenuously object to your attempting to curtail the teachers' rights and duty to express their point of view in a setting which is uncontaminated by interference.

Teachers have fought for centuries for Academic Freedom. While I would contend that "freedom is not license", I would suggest that there is a necessity for an ambience where individuals can express their opinions freely.

It is vis-a-vis the last point that I recently asked for your definition of "Peril" *as referred to* in your memo of October 12. Rule through fear has historically been shown to be folly. For a Union President to threaten union members would seem to be unwise as a leadership style. It is, of course, the decision of the rank and file if their Local is to be managed in a truly representative fashion or in a dictatorial manner. I can only hope that your position on this issue reflects the former method, as the Administration is dedicated to having an "open" environment where

freedom of expression on all matters by all members of the College Community is an undeniable right.

Since you refuse to identify the threats one faces in speaking on faculty evaluation, could you at least identify that part of the union constitution one would be charged under should one choose to exercise what I contend would be his rights (in our system of justice there must be a law before one can break the law)? For the purpose of answering this question, allow me to quote from *Constitution, 1981 Edition – Ontario Public Service Employees Union*:

“Article 22

DISCIPLINE

- 22.1 Any member of the Union is liable to be charged, tried and found guilty of an offence against the Union if s/he:
- (a) Fails to comply with this Constitution, with regulations made pursuant to it, or with duly-approved by-laws adopted by his/her Local or other subsidiary body of which s/he is a member;
 - (b) Fails, when required to do so, to account properly for receipt and disbursement of union funds and for receipt and disposition of Union funds and for receipt and disposition of Union goods and equipment;
 - (c) Misappropriates or otherwise fraudulently obtains any funds or property of the Union;
 - (d) Obtains or retains membership through misrepresentation or fraudulent means;
 - (e) Disrupts or obstructs any Union meeting or Convention to the point where the business of the meeting may not be fairly and reasonably conducted;
 - (f) Promotes, solicits, encourages, advocates, or knowingly assists others to promote, solicit, encourage, or advocate the withdrawal of members from the Union;
 - (g) Publishes or circulates, either within the Union or outside, false reports or misrepresentations about the Union or any Officer or member of the Union with respect to the activities of the Union or members.
 - (h) Solicits funds or advertises or seeks personal financial gain, by using, without authorization, the name of the Union or his/her position in it or lists of members.

- (i) Wrongfully and without just cause interferes with any Officer or official of the Union engaged in the proper discharge of his/her duties.
- (j) Institutes proceedings under this Article which are vexatious or frivolous.”

How would the threatened accusation be worded?

It also seems that you do not understand the discrepancy between “recommendation” and “agreement”. While I, too, could refer you to the Oxford English Dictionary for enlightenment I will refrain from doing so. Instead, let me point out that the Academic Committee discusses issues of a pedagogical nature from an academic point of view. It subsequently makes *recommendations* to the Vice-President (Academic). Any *agreement*, if such were to be negotiated, would be reached at the College Committee.

Finally, for future reference, I would like to suggest that, when a seeming inconsistency in our administrative style vis-a-vis good management occurs, you call the appropriate College Officer to talk the situation over before sending memoranda to numerous people. In that way, misconceptions such as the one which precipitated this entire discourse, can easily, professionally and efficiently, be cleared up.

In summary it would seem that:

1. You have been incorrectly informed about recent suggestions to changes in terms of reference of the Academic Committee.
2. The College exists because of the students, not for its employees.
3. The Vice-President (Academic) must be able to consult with all individuals so as to ameliorate and widen his perspective of all issues under his jurisdiction.
4. We must develop an atmosphere where discussions on areas of a professional nature can be freely held.
5. Threatening union members may be an infringement on rights of both the Administration as well as the Union itself.
6. It must be emphasized that no agreement would be negotiated at the Academic Committee. Recommendations, however, would be forthcoming as a result of discussions emanating from a pedagogical environment.
7. Fanshawe College would be better served if a more informal type

of communication preceded the issuance of memoranda filled with threats and inflammatory language.

NOTE: Because of the potential seriousness of this situation, which could be the muzzling of the Academic Committee in some of its deliberations if we acquiesced to your demands, I have concluded that I should share with *all* members the contents of these memoranda.

12. The "war of words" continued with the following memo dated November 7, 1983 from Mr. Grunwell to Dr. Bissett (with copies to the faculty members on the Academic Committee):

This is in response to yours on November 2.

I will deal first with your perplexity at the Union's position, which perplexity was outlined in your first 3 paragraphs. Your concern appears to centre on the first sentence of the 3rd para in my memo to you of Oct. 12. If so, your professed desire for less formal types of initial communication on issues (your item 7, p.5) seems somewhat hollow. You could have asked for clarification in mid October (as one of the other committee members did) and such would have been provided. I enclose a copy of my response to the member who raised the issue; I have however deleted the member's name.

I will not waste my time responding to your next 13 paragraphs (most of which are irrelevant to the issue) other than to observe that:

- a) My "simplistic" and "unrealistic" view of employer-employee relations is supported by a Masters Degree in Management Science and based on a considerable familiarity with relevant labour legislation and arbitral jurisprudence.
- b) The provisions of Art. 22 of *our* Constitution (you have seen an out-dated copy by the way) are no concern of yours. It would have been more meaningful for you to have read the Colleges Collective Bargaining Act, Sects. 52(1), 53 and 76, also Art. 1.01 of the Collective Agreement.
- c) You seem to be carrying on in the fine Fanshawe tradition of ignoring the union, the collective agreement, the law and anything else which would interfere with your right to do as you please. This *modus operandi* has annually resulted in more grievances at Fanshawe than at all other colleges combined. No doubt that will continue too!

My summary response to your summary is:

- 1) I have not been incorrectly informed about anything. My concerns were, are and will continue to be about unprincipled attempts by

management to undercut the lawful role of the Union on bargainable issues and to use my members as unwitting allies in that process. These concerns take on a new urgency since you have restructured the committee.

- 2) The College may well exist because of the students but you will deal with the Union on terms and conditions of employment because the law requires you so to do.
- 3) Your right to do whatever you wish as academic V.P. is substantially constrained by, inter alia, the Colleges Collective Bargaining Act and the Collective Agreement.
- 4) You may freely discuss "professional issues" wherever and with whomever you wish. You will, however, discuss bargainable issues with the Union representing the affected employees because the law requires you so to do.
- 5) I do not recall threatening Union members. I merely observed that collusion with management in attempting to undercut the lawful role of the Union would be ill-advised and would place members "at peril". I cannot understand your preoccupation with the disciplinary measures the Union might take against them unless perhaps you recognize the fundamental impropriety in asking these members to become your collaborators in undermining their Union and are concerned for their safety.
- 6) My answer to your point 4 seems also to cover this.
- 7) This cuts 2 ways as I have already observed in my para 2.

13. On or about December 13, 1983, the College filed the following grievance with the Union, in the form of a memo from Dr. Bissett to Mr. Grunwell, with copies to the Union Grievance Officer, the College President, two other named individuals, and the members of the Committee:

We had hoped that, over the past few weeks, you might have modified your position regarding the "peril" in which your memo of 1983 10 12 indicates that members of the Academic Committee will find themselves if they continue to discuss certain topics within that committee. Subsequent correspondence and other events make it clear your position has not been modified, and lead us to conclusions that are totally unacceptable to the College.

Prior to stating those conclusions, let me briefly summarize the history of this matter:

- This Fall the Academic Committee terms of reference were modified (Appendix 'A'). Both before and after modification, these terms of

reference make it clear this committee's purpose is to provide recommendations to the College regarding matters related to academic processes.

- Your memo of 1983 10 12 (Appendix 'B'), which was copied to faculty members of the Academic Committee, begins by accusing the College of unlawful activities, centres on your erroneous view of certain topics under review by that Committee, and concludes with a non-specific threat against faculty members as well as further accusations against the College.
- Our exchange of memos dated 1983 10 17 and 18 (Appendices 'C' & 'D') affirm there is a threat but do little to elaborate.
- Your Memo of 1983 10 24 (Appendix 'E') to faculty members of the Academic Committee provides the rationale for your earlier threat, and for your belief that the Union has the "sole authority to speak on behalf of members."
- My memo of 1983 11 02 (Appendix 'F') provides the College view of this matter.

Therefore: Firstly, be advised that we do not agree that any faculty members have ceded the right to speak freely with the College on matters of mutual concern and interest. Additionally, the terms of reference for the Academic Committee (Appendix 'A') make it eminently clear that this Committee is not a bargaining forum. We are extremely concerned that a Union officer would attempt to interfere with faculty members (be they Union members or not) involved in legitimate discussion of matters related to the very purpose of the College.

Secondly, be advised that we conclude that you do indeed intend faculty members of the Academic Committee to feel under threat if they continue to participate fully as elected members of the Committee. We further assume (from your reference in Appendix 'E' to non-Union members) that your ability to carry out any threat is linked to the question of whether or not the faculty member is or is not a member of the Union.

We believe your actions constitute an attempt to intimidate and coerce faculty members and the College to act in accordance with your wishes. This action is not only odious, but clearly is an attempt to interfere with legitimate College processes.

In view of the above, the College grieves that Local 110, through its President, stands in violation of Article 2 of the Collective Agreement.

By way of remedy, the College seeks for Local 110 to:

- Declare that the Collective Agreement has been violated.

- Retract all offending correspondence and apologize to those to whom its content is directed.
- Refrain from any further action of a similar nature.

Article 2 of the collective agreement provides as follows:

RELATIONSHIP

2.01 The Colleges and the Union agree that there will be no intimidation, discrimination, interference, restraint or coercion exercised or practised by either of them or their representatives or members because of an employee's membership or nonmembership in the Union or because of his activity or lack of activity in the Union or because of his filing or not filing a grievance.

2.02 The Union further agrees that there will be no solicitation for membership, collection of dues, Union Executive or membership meetings or other Union activities on the College premises, except as specifically set out in this Memorandum or by written permission of the College concerned, but such permission shall not be unreasonably withheld.

14. A copy of that grievance was posted on a bulletin board in the Maths and Sciences office by the Department Chairman, a member of management excluded from the academic bargaining unit. That bulletin board is used primarily by the Department Chairman to post notices and other materials which he wishes faculty members to see, including the materials pertaining to Academic Committee meetings. Copies of the other memos between Mr. Grunwell and Dr. Bissett concerning the Academic Committee were also posted on that bulletin board. There is no evidence before the Board that the grievance was posted in other locations on the campus, or that the posting in the Maths and Sciences office was done at the direction of Dr. Bissett or any other senior member of management. Indeed, Dr. Bissett testified that he did not instruct anyone in the Administration to post that grievance.

15. Since the administration had been experiencing what they perceived to be "less than a constructive atmosphere" at the College Instructional Assignment Committee (the "C.I.A.C."), it was decided that a second College grievance would be filed. The C.I.A.C. consists of three persons appointed by the College and three persons appointed by the Union, including Mr. Grunwell. Under Article 4.02(a) of the collective agreement, its functions include considering and resolving faculty complaints concerning inequitable instructional assignments. That second College grievance was filed with the Union on December 15, 1983. It reads:

Over the past several weeks, it has become clear from statements and actions by Union members of the C.I.A.C. that several individual complainants and Local 110 are refusing to provide the committee with the particulars of their complaints, or with the information which leads them to believe that the workload involved is inequitable.

The College takes the position that such refusal renders it impossible for the committee to engage in meaningful discussion or to properly consider a claim of inequity. Such refusal defeats the primary purpose of the C.I.A.C. Further, since the committee is unable to properly deal with such claims, both the complainants and the College are denied the benefits of natural justice and of any remedial action which might have been warranted.

In view of the above, the College grieves that the several individual complainants and Local 110 have breached and continue in breach of Article 4.02 of the collective agreement.

As remedy, the College seeks to have the complainants (or the Union C.I.A.C. members who claim to speak on their behalf) and Local 110 fulfil the intent of the collective agreement by providing the C.I.A.C. with full particulars of each claim, and by participating appropriately in considering each claim. This remedy is to be applied from this time forward, and retroactively to each of the claims dealt with this Fall where full particulars were not provided.

There is no evidence before the Board that the College's December 15, 1983 grievance was publicly posted, as alleged by the Union in this application.

16. The Board's function in applications for consent to prosecute was described as follows in *Fleck Manufacturing Company*, [1978] OLRB Rep. July 615:

2. On an application for consent to prosecute the function of the Board is to determine whether the evidence discloses a *prima facie* case against the respondents, raising arguable points of law appropriate for consideration by the Provincial Court. In performing this function the Board must be convinced not only that there is some evidence to support the prosecution but also that a prosecution would serve the interests of the bargaining relationship between the parties or generally advance the interests of collective bargaining in the Province.

3. The Board will, therefore, first review the evidence to find whether a *prima facie* case has been made out against each respondent and will turn lastly to consider, if such a case is established, whether it would serve the interests of industrial relations to grant consent to prosecute. It should be emphasized that in reviewing the evidence the Board does not make any final findings of fact nor does it make any ultimate determination as against any of the respondents. That is the exclusive function of the Court.

Although that case arose under section 101(1) of the *Labour Relations Act*, similar considerations apply to applications under section 89(6) of the *Colleges Collective Bargaining Act*. See also *Newport Sportswear Limited*, [1981] OLRB Rep. July 905; *Cameron Packaging Inc.*, [1979] OLRB Rep. July 614; *Arthur G. McKee and Company Canada Limited*, [1976] OLRB

Rep. Oct. 637; *CCH Canadian Limited*, [1974] OLRB Rep. June 375; and *The Norfolk Hospital Association*, [1974] OLRB Rep. Sept. 572.

17. Having carefully considered all the evidence and the submissions of the parties, we have concluded that the evidence does not disclose a *prima facie* or arguable case against either of the respondents. Although it is possible to conceive of situations in which an employer's use of elected employees (who are not union officials) as a source of information about employee views could contravene section 75(1) of the Act, there is no evidence in the present case that the College, or Dr. Bissett on behalf of the College, has participated in or interfered with the selection, formation or administration of the applicant, or its representation of employees, by restructuring the Academic Committee as described above. That committee does not make any binding decisions, but rather merely makes recommendations to the Vice-President (Academic) concerning matters of general policy and procedure relating to academic processes of the College. Policy and procedures concerning the three areas of particular concern to Mr. Grunwell – evaluation of faculty, faculty conduct, and student complaints about faculty members – are not specified in the collective agreement but rather fall within the scope of the (Article 7) management functions clause in the collective agreement, which provides:

7.01 It is the exclusive function of the Colleges to:

- (a) maintain order, discipline and efficiency;
- (b) hire, discharge, transfer, classify, assign, appoint, promote, demote, lay-off, recall and suspend or otherwise discipline employees subject to the right to lodge a grievance in the manner and to the extent provided in this Agreement;
- (c) to manage the College and, without restricting the generality of the foregoing, the right to plan, direct and control operations, facilities, programmes, courses, systems and procedures, direct its personnel, determine complement, organization, methods and the number, location and classification of personnel required from time to time, the number and location of campuses and facilities, services to be performed, the scheduling of assignments and work, the extension, limitation, curtailment, or cessation of operations and all other rights and responsibilities not specifically modified elsewhere in this Agreement.

7.02 The Colleges agree that these functions will be exercised in a manner consistent with the provisions of this Agreement.

Thus, the College would be at liberty to unilaterally prepare, adopt, and apply policies and procedures in respect of the aforementioned three matters, subject, of course, to the right of a faculty member to grieve any disciplinary action taken against him or her through the application of those policies and procedures. Consultation of the type described above is far from rare in the context of an institution of higher learning such as a university or community college, where concepts of collegiality and professionalism often lead to recommendatory (and decision-making) mechanisms which have few parallels in the industrial context. There is no evidence whatsoever in the present case that the College has used or attempted to use the

faculty's new majority voting status on the Academic Committee as a form of leverage at the bargaining table, or in any other manner in its dealings with the applicant or the persons whom it represents. Indeed, the revised terms of reference expressly preclude any such use. Section 3.5 provides:

Participation by Faculty members in the work of the committee and its sub or Ad-hoc committees shall not be construed as imputing any representative status to such faculty members for the purposes of determining the position of the bargaining unit, or any part thereof, on any matter; neither shall the support or non-support of the recommendations of the committee or its sub or Ad-hoc committees by faculty members be cited for the purpose of determining the position of the bargaining unit, or any part thereof, on any matter.

Thus, there is no evidence of any attempt to make an "end run" around the applicant, as alleged by Mr. Grunwell in his aforementioned memo dated October 12, 1983, nor of any other contravention of section 75(1) by the College in restructuring the Academic Committee. Indeed, the College has offered to renew an expired "local agreement" with Local 110, under which the College expressly agreed that its existing policy and procedure for evaluation of academic employees would not be amended without prior consultation with the College Committee, which is a local committee appointed by the Union (pursuant to the provisions of the collective agreement) to meet with a committee appointed by the College to discuss various matters of mutual concern, such as local application of the collective agreement, and the clarification of procedures or conditions causing misunderstandings or grievances. (Mr. Grunwell has declined (on behalf of Local 110) to accept that offer because he is of the view that consultation "sounds nice" but is worthless.)

18. The applicant also alleges that Dr. Bissett's memo of November 2, 1983 and the College's December 13, 1983 grievance provide a legitimate basis for granting consent to prosecute. However, having regard to all of the circumstances, we are satisfied that the views expressed in those documents fall within the respondents' freedom of expression, guaranteed by section 75(1) of the Act. (With respect to the matter of employer freedom of speech in the context of labour relations legislation similar to section 75(1) see, generally, *American Can Canada Inc.*, [1983] OLRB Rep. Oct. 1609, and the authorities referred to in that decision). Through his memo of November 2nd, Dr. Bissett attempted to dissuade Mr. Grunwell from threatening faculty members on the Committee with an unspecified "peril", and sought information concerning the nature of that "peril", but did not use "coercion, intimidation, threats, promises or undue influence" within the meaning of section 75(1), or otherwise interfere with the administration of the applicant or its representation of employees. We accept Dr. Bissett's evidence that he perceived Mr. Grunwell to be threatening faculty members on the Committee with an unspecified "peril", and believed that Mr. Grunwell thereby infringed upon the rights of the Administration, as well as the rights of the faculty members concerned. Under the circumstances, it cannot accurately be said that the situation involved solely internal union matters that were of legitimate concern only to the applicant.

19. We are also satisfied that the filing of the aforementioned College grievances does not raise a *prima facie* or arguable case in respect of section 75(1). The filing of bona fide grievances concerning the interpretation, application or alleged contravention of the collective

agreement is clearly within the College's rights under Article 11.11 of that document. Moreover, provision for final and binding settlement by arbitration of all differences between an employer and the employee organization arising from the interpretation, application, or alleged contravention of the collective agreement is made mandatory by section 46(1) of the Act. If a collective agreement does not so provide, it is deemed to include the arbitration clause set forth in section 46(2) of the Act, which permits either party to refer such differences to arbitration. The applicant suggests that the College violated section 75(1) of the Act by requesting the remedies specified in those grievances. However, we find no merit in that submission. The appropriateness (and legality) of the requested remedies is a matter to be resolved through the grievance and arbitration procedure under the collective agreement, and is not a matter which the Board is prepared to consent to have resolved in quasi-criminal proceedings under section 89 of the Act. While as a matter of labour relations policy the posting of an employer grievance on a bulletin board for the information of bargaining unit members may be an imprudent course of action for an employer to adopt, it does not constitute a *prima facie* or arguable contravention of section 75(1) of the Act in the present circumstances, in view of the extent to which the matters covered by the grievance in question had already been communicated to various faculty members through copies of Mr. Grunwell's and Dr. Bissett's memos, and in view of the fact that the issues in dispute transcended the interests of the applicant and the respondents and raised matters of concern to the faculty at large (and to the students whose participation in Academic Committee deliberations might also be affected by the ultimate resolution of the matters in dispute).

20. Since we have concluded that the applicant has failed to show a *prima facie* or arguable case against either of the respondents, it is unnecessary to express any view concerning whether this would have been an appropriate case in which to exercise our discretion under section 89(6) of the Act to consent to the institution of a prosecution of the respondents if a *prima facie* or arguable case had been established. It is also unnecessary to determine the correctness of the applicant's contention that this Board has no jurisdiction under section 77 of the Act to inquire into alleged contraventions of section 75(1). We also find it unnecessary to consider the respondents' submission that the matters encompassed by this application could more effectively be dealt with by arbitration under the provisions of the collective agreement, than by proceedings under section 89 of the Act.

21. For the foregoing reasons this application is hereby dismissed.

DECISION OF BOARD MEMBER L. C. COLLINS;

I am of the view that this matter raises an arguable case of a contravention of section 75(1) of the *Colleges Collective Bargaining Act* and I would grant consent to institute a prosecution against the respondents.

2560-83-R Retail, Wholesale & Department Store Union, Local 414, Applicant, v. Ancaster Supermarkets Limited, c.o.b. as **I.G.A.**, Respondent

Sale of a Business – Chain food store closing operations – Independent store owner acquiring assignment of lease and some assets from closed store – Opening new food store 1 1/2 years after closure – No sale of business

BEFORE: R. O. MacDowell, Vice-Chairman, and Board Members B. L. Armstrong and W. H. Wightman.

APPEARANCES: *David I. Bloom and John Fuller for the applicant; Mark Contini, Peter Berti and Paul Berti for the respondent.*

DECISION OF THE BOARD; April 19, 1984

1. This is an application under section 63 of the *Labour Relations Act*. The applicant union claims that Dominion Stores Limited has sold part of its business to the respondent and that, accordingly, the respondent is a “successor employer” within the meaning of section 63. The applicant union seeks a declaration to that effect. The material portions of section 63 are as follows:

63.-(1) In this section,

- (a) “business” includes a part or parts thereof;
- (b) “sells” includes leases, transfers and any other manner of disposition, and “sold” and “sale” have corresponding meanings.

(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been a party thereto and, where an employer sells his business while an application for certification or termination of bargaining rights to which he is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if he were named as the employer in the application.

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3. The facts are not substantially in dispute. For many years Dominion Stores Limited (“Dominion”) operated a retail food market in the Ancaster Plaza on Wilson Street in Ancaster, Ontario. It was one of three chain stores in the immediate vicinity. There was a Miracle Food Mart across the street and a Zehrs Market in a neighbouring building. Ancaster Plaza itself is part of a cluster of similar commercial premises in the immediate area. One of the particular advantages of the Ancaster Plaza, however, is the presence of a liquor store and a beer store.

4. The Dominion Store in the Ancaster Plaza was closed in August of 1982. The stock-in-trade was removed, and a "for rent" sign placed in the window. The employees exercised their bumping rights under the subsisting collective agreement between Dominion and the applicant union. Many of them were able to transfer to other Dominion stores in the Hamilton area, although the evidence does not establish whether they all were successful in obtaining alternative employment at these other stores. In any event, there was no business activity at the former Dominion premises on Wilson Street until January, 1984, when the respondent opened his independent I.G.A. food market.

5. Peter Berti, the owner of the respondent has been in the food business for twenty-five years, most recently as the proprietor of independent "I.G.A." food stores. At the present time he operates two such stores: one in Hamilton, and one in the Ancaster Plaza in the premises formerly occupied by Dominion. Mr. Berti testified that he noticed the vacant premises almost by accident in late August, 1984, when he happened to be driving through Ancaster. Subsequent inquiries revealed that Dominion was still the lessee. Its lease expired in 1986, but had renewal options which could extend it for a further twenty-two years. After some negotiation between the respondent, Dominion, and the landlord of the Plaza, the respondent acquired an assignment of Dominion's lease. In a separate but related transaction, the respondent also acquired certain display tables, scales, shelving, coolers and refrigeration equipment which were on the premises and are more particularly described in the appendix to exhibit #4, the Bill of Sale. The respondent then injected about a hundred thousand dollars of its own capital to purchase new equipment and renovate the interior of the store. The renovations included some new plumbing and wiring, the construction of partitions and painting the premises. The transaction with Dominion did not include any signs, or stock-in-trade, nor is there any express transfer of good will or a non-competition covenant. However, the nearest Dominion Store is several miles away and it is evident that for practical purposes Dominion was withdrawing from that local market.

6. The "new" food store opened for business on January 18, 1984 – that is, almost a year and a half after its predecessor had closed. Mr. Berti testified that he hoped to distinguish himself from the other "chain stores" in the area by emphasizing his independence and the kind of special customer service which he thought he could provide. He said as much in an interview with the local newspaper where he regularly advertises. In other words, he hopes to capitalize upon the fact that he is *not* like Dominion or the other two chain stores in the immediate area which are his principal competition.

7. There is no doubt that section 63 frequently gives rise to vexing questions of interpretation and the retail food industry seems to have contributed more than its fair share of such problems over the years. Indeed, in purely numerical terms, there have probably been more successor rights cases in the retail food industry than in any other part of the economy. But we do not intend to review this extensive Board jurisprudence. That task was recently undertaken in a decision released several weeks ago involving this very applicant (see *Retail, Wholesale and Department Store Union, Local 414 and Queensway Foods Limited*, [1984] OLRB Rep. Feb. 358. In *More Groceteria Limited*, [1980] OLRB Rep. April 46, the Chairman of the Board conducted a similar review. We see little purpose in repeating this exercise. It suffices to say that each case in this area turns upon its own particular facts.

8. The critical factor in this case is that Dominion closed its business and it remained closed for almost a year and a half. It was only by chance that Mr. Berti happened to pass

the premises about a year after the closure, or they might still be vacant today. Even if we accept that the success of a food market is dependent upon the support of the people who live in the locality and that any goodwill consists in the habit of customers continuing to patronize a food market located on the same premises, such goodwill would have long since dissipated by the time that the respondent opened its business. It is reasonable to infer that in the year and a half between the closure of Dominion and the opening of the respondent, Dominion's former patrons simply went next door or across the street. If those customers are "recaptured" it will not be because of any loyalty to Dominion. It will be because the respondent's products or service are good enough to deter local customers from shopping next door – whether or not in past years they might have shopped at Dominion. Accordingly, it is difficult to conclude that the respondent is, in some way, carrying on Dominion's "business". Rather, what has occurred here is merely a transfer of certain surplus assets which the respondent has incorporated into its own business. That characterization would be consistent with the decision of the Board in *Darrigo Consolidated Holdings Inc.*, [1980] OLRB Rep. Jan. 29, where the form of the transfer and the facts are substantially similar to those in the present case. There too, a long hiatus was considered the significant factor in concluding that there had not been a "sale of a business" within the meaning of section 55 [now 63] of the Act. (See also *Zehrs Markets Limited*, [1974] OLRB Rep. May 331.)

9. In the circumstances of this case, the Board is unanimously of the view that there has not been a "sale of a business" within the meaning of section 63 of the *Labour Relations Act*. The application is therefore dismissed.

1277-83-R Interior Systems Contractors Association of Ontario, Applicant, v. Dry-wall Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America, Respondent

Accreditation – Board determining employer bargaining unit for province-wide residential drywall installation work – issuing certificate of accreditation to applicant

BEFORE: R. A. Furness, Vice-Chairman, and Board Members C. A. Ballentine and J. D. Bell.

APPEARANCES: *Robin B. Cumine, Q.C. and Saul Marmurek for the applicant; H. K. Weller for the respondent; Joseph Liberman for the Acoustical Association of Ontario; B. W. Binning for Cloke Construction Limited; Glencon Construction Ltd. and Beaver Cook Leitch (Ontario) Limited; Richard Nixon, John Favaro and Gord Buttle for Canadian Gypsum Company; Henry Losereit for Losereit Sales & Services Limited; and David Hewson for Leonard Hewson Ltd.*

DECISION OF THE BOARD; April 27, 1984

1. This is an application for accreditation, construction industry, wherein the applicant seeks to be accredited as the bargaining agent for certain employers who have a bargaining relationship with the respondent. The respondent is a party to a collective agreement with the applicant which is dated June 15, 1982. This collective agreement became effective on June

15, 1982, and expires on April 30, 1984, with provision for renewal biennially thereafter unless either party furnishes the other with notice of termination or proposed revision within one hundred and twenty days before April 30, 1984, or in a like period in any biennial year thereafter. Having regard to the material before it, the Board is satisfied that more than one employer is affected by this application and is bound by this collective agreement. The Board therefore finds that it has jurisdiction under section 125 of the *Labour Relations Act* to entertain this application.

2. The applicant is an incorporated association. In support of its application, the applicant filed a copy of its letters patent dated September 1, 1971, supplementary letters patent dated May 24, 1974, and its by-laws dated May 8, 1979. By the supplementary letters patent the name of the applicant was changed to Interior Systems Contractors Association of Ontario from The Drywall Association of Ontario. Having regard to the material before it and to the representations of the parties, the Board further finds that the applicant is an employers' organization within the meaning of section 117(d) of the *Labour Relations Act* and is satisfied that the applicant is a properly constituted organization for the purposes of section 127(3) of the *Labour Relations Act*.

3. The applicant also filed in support of its application sixty-five documents entitled "Authority of Employer to Interior Systems Contractors Association of Ontario". These documents appoint the applicant to act on behalf of the employer in all aspects of and all matters concerning or arising out of any collective agreement currently in force between the employer and the respondent. These documents assign to and vest in the applicant all rights to bargain on behalf of the employer and to enter into collective bargaining agreements or any renewal thereof or extension or modification thereto with the respondent and also vest in the applicant all necessary and appropriate authority to enable it to discharge all of the responsibilities of an accredited bargaining agent pursuant to the *Labour Relations Act*. These documents also appoint the applicant as the employer's agent and representative to make an application or applications for accreditation or to apply to be designated as an employers' organization under the *Labour Relations Act* with respect to such sector or sectors and for such geographical area or areas as the applicant may deem appropriate. The applicant also filed in support of these documents a duly completed Form 88, Declaration Concerning Representation Documents Application for Accreditation, Construction Industry. The Board is satisfied that the evidence of representation meets the requirements set out in section 120 of the Board's Rules of Procedure and the Board is further satisfied that the individual employers on whose behalf the applicant has submitted evidence of representation have vested appropriate authority in the applicant to enable it to discharge the responsibilities of an accredited bargaining agent.

4. The collective agreement referred to in paragraph one applies to and is effective within the Province of Ontario. The applicant and the respondent agree that this is the appropriate geographic area for accreditation in this application. The applicant and the respondent have also agreed that pursuant to this collective agreement employees have been employed in the residential sector of the construction industry. Having regard to the agreement of the applicant and the respondent, the Board finds that all employers of carpenters and carpenters' apprentices engaged for the application of metal and gypsum lath, gypsum drywall boards and metal components to receive same, screeds and bead accessories, acoustical ceiling systems, thermal insulation, including vapour barrier, metal door frames installed in lath and plaster and drywall partitions for whom the respondent has bargaining rights in the Province of Ontario

in the residential sector of the construction industry, constitute a unit of employers appropriate for collective bargaining.

[Employer lists as determined by the Board omitted]

• • • •

12. On the basis of all the evidence before it, the Board finds that on the date of the making of this application, the applicant represented 46 of the employers on Final Schedule "E". The 46 employers is the number of employers to be ascertained by the Board under section 127(1)(b) of the *Labour Relations Act*. Accordingly, the Board is satisfied that a majority of the employers in the unit of employers is represented by the applicant.

13. The Schedule "H" which accompanied the Form 94 Employer Filing, filed by the individual employers, sets out the number of employees that the employer has at each job site with details of the location of the type of construction involved. By section 127(1)(c) of the *Labour Relations Act*, the payroll period immediately preceding the making of the application is the relevant weekly payroll period for determining the number of employees affected by the application. On the basis of the evidence before it, the Board finds that there were 788 employees affected by this application during the payroll period immediately preceding September 9, 1983, or for such other weekly payroll period with respect to certain employers where the said payroll period immediately preceding September 9, 1983, was unsatisfactory. The 788 employees is the number of employees to be ascertained by the Board under section 127(1)(c) of the *Labour Relations Act*.

14. The Board finds that the 46 employers represented by the applicant employed 663 of these 788 employees. The Board is therefore satisfied that the majority of the employers represented by the applicant employed a majority of the employees affected by this application as ascertained in accordance with the provisions of section 127(1)(c) of the *Labour Relations Act*.

15. Having regard to all of the above findings a Certificate of Accreditation will issue to the applicant for the unit of employers found to be an appropriate unit of employers in paragraph four herein, and in accordance with the provisions of section 127(2) of the *Labour Relations Act* for such other employers for whose employees the respondent may after September 9, 1983, obtain bargaining rights through certification or voluntary recognition in the geographic area and sector set out in the unit of employers.

1309-83-U Schneiders Office Employees Association, Complainant, v. J. M. Schneider Inc. and Link Services Inc., Respondents

Change in Working Conditions – Remedies – Unfair Labour Practice – Policy manual setting out system of progressive discipline treated by management as authoritative and mandatory – Rights in manual subject to freeze – Grievors discharged contrary to frozen policy reinstated with pay – Presence of unlawful animus not pre-condition to direction of posting of employee notice

BEFORE: Owen V. Gray, Vice-Chairman, and Board Members I. M. Stamp and F. S. Cooke.

APPEARANCES: *Ross Wells and Gidge Trepanier for the complainant; R. J. Drmaj, Brian Eckert, J. MacNicol and P. DeVrieze for the respondents.*

DECISION OF THE BOARD; March 19, 1984

1. In this complaint filed under section 89 of the *Labour Relations Act*, the complainant trade union alleges that Philip Honsinger, Philip King, Barbara Lovell and Martha Grove (“the grievors”) were dealt with by the respondents in a manner contrary to the provisions of the *Labour Relations Act*.

2. On the morning of September 13, 1983, the grievors were all at work as programmer analysts in the information systems department of J. M. Schneider Inc. (“Schneiders”). That morning their immediate superior, Paul DeVrieze, approached each of them individually. He told Philip King he wanted to meet with him at 2:30 that afternoon to find out how things were going. He told Barbara Lovell there would be a project status meeting at 2:30 that afternoon. He asked Honsinger to come to a meeting at 2:30. Honsinger thought this was to discuss his future work. DeVrieze asked Grove to attend a 2:30 meeting to discuss the reorganization of the office. Shortly before 2:30, the grievors were each told that the meeting to which they had been invited would be held in a conference room in the Personnel area, three floors below the area in which they worked. The respondents’ manager of compensation and benefits, Murray O’Brien, was there when the grievors arrived. Paul DeVrieze walked in, sat down, opened a file folder, and read a prepared text: “After careful consideration, I find I have no alternative but to terminate your employment effective immediately”, or words to that effect. He then took the grievors’ security badges, without which they could not again return to their work areas. Each grievor was given a letter offering him or her a “termination package”. None of the letters contained any explanation of the addressee’s termination. Lovell asked DeVrieze “why?” several times. DeVrieze paid no attention. He got up and left without further comment. The grievors were then introduced to an outside consultant whose job search assistance program was part of the termination package they had each just been offered. That was their last day at Schneiders. Before the end of that day, they spoke to their trade union representatives. This complaint was filed the next day, September 14, 1983.

3. On November 22, 1982, the complainant trade union applied for certification as the bargaining agent for a bargaining unit consisting of office and clerical employees of both respondents (Board File No. 1619-82-R). (Schneiders’ plant employees have for some time been represented by another trade union, the Schneiders Office Employees Association.) The complainant was found to be a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act* in a decision dated December 20, 1982. The complainant was awarded interim

certification in a decision dated April 16, 1983, and gave notice to bargain on June 17, 1983. The last of the disputes over the composition of the bargaining unit was later resolved, and a final certificate was issued October 11, 1983. All four grievors are within the bargaining unit described in both the interim certification decision and the final certificate.

4. The parties were still bargaining for a first collective agreement when the grievors were terminated September 13, 1983. The complainant does not now allege that anti-union animus played any part in the respondent's decision to terminate the grievors. The complainant's case is based on section 79(1) of the Act, which reads as follows:

79.-(1) Where notice has been given under section 14 or section 53 and no collective agreement is in operation, *no employer shall, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty, of the employer, the trade union or the employees, and no trade union shall, except with the consent of the employer, alter any term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees,*

(a) until the Minister has appointed a conciliation officer or a mediator under this Act, and,

(i) seven days have elapsed after the Minister has released to the parties the report of a conciliation board or mediator, or

(ii) fourteen days have elapsed after the Minister has released to the parties a notice that he does not consider it advisable to appoint a conciliation board,

as the case may be; or

(b) until the right of the trade union to represent the employees has been terminated,

whichever occurs first.

(emphasis added)

The parties are in agreement that the "statutory freeze" imposed by section 79(1) was in effect as of the date of termination of the grievors. The complainant's case is that the grievors' terminations were contrary to the provisions of the respondent's "Policy Manual". The complainant says that the Policy Manual describes pre-freeze terms and conditions of employment and rights, privileges and duties of both Schneiders and its employees, and that the statutory freeze imposed on Schneiders an obligation to manage its employee relations with employees in the bargaining unit, and particularly the discharge and discipline of those employees, in accordance with the provisions of that Policy Manual. Schneiders' defence is that compliance with the provisions of the Policy Manual was not "frozen" by section 79 or, if it was, a management right to deviate from those provisions was equally preserved, and in any event,

that the termination and manner of termination of each of the grievors was consistent with the provisions of the Policy Manual.

5. The "Policy Manual" is a collection of over 30 separate, multi-page policy documents compiled in a binder with a table of contents. The table of contents shows the policies organized into groups designated by letter: "A - Employment Practices", "B - Hours of Work", "C - Employee Benefits", "D - Employee Relations", "E - Pay & Salary Administration", "F - Training", "G - Company and Plant Rules", "H - Discipline", "I - Termination of Employment" and "J - Personnel Records". The policies in each group are numbered, so that each is identified by a letter, number and title - for example: "A-2 Classification of Employees", "B-2 Overtime", "D-4 Bulletin Boards", "D-5 Grievances", "G-6 Parking", and so on. In addition to its letter, number and title, each policy bears an "issued" date, a "revised" date, and an "approved" space where that document has been initialed by the President of Schneiders. The earliest "issued" dates fall in 1966. Nearly all the "revised" dates fall in or after 1977. As noted in its Table of Contents, the Policy Manual also contains two prefaces to the actual collection of policies: a document styled "Purpose of the Manual", and another styled "Distribution of the Manual". They read as follows:

I PURPOSE OF POLICY AND ORGANIZATION MANUAL

In this Company, policies are considered guidelines for administrative convenience and consistency. Organization charts show lines of responsibility and indicate working relationships.

This manual contains statements of personnel policies and procedures. These are designed to be a working guide for supervisory staff in the day-to-day administration of our company personnel program.

It is hoped that these policies will increase understanding and assist in personal decisions on matters of company-wide policy, and help to assure uniformity of personnel practices throughout the organization. It is the responsibility of each and every member of management to administer these policies in a consistent and impartial manner.

Procedures and practices in the field of employer-employee relations are subject to modification and further development in the light of experience. Each member of management can assist in keeping our personnel program up to date by notifying the Personnel Department whenever problems are encountered or improvements can be made in the administration of our personnel policies.

II DISTRIBUTION OF MANUAL

This manual is assigned to positions and/or areas which involve supervisory/managerial responsibilities. It has limited distribution in order to keep the burden of maintenance to a minimum. However, it is not intended to be kept secret. Those persons to whom it is issued, or who

have the responsibility of maintaining the manual, have an equal responsibility to ensure that employees have access to any policy that affects them.

Your co-operation is requested in keeping the manual up to date when policy or organization changes are sent to you in the future. This manual can be a reliable and effective tool for good management if carefully maintained.

6. Policy D – 5 “Grievances” bears an “issued” date of June 2, 1975. The text of that policy begins with the following statement:

Harmonious relationships between employees and the Company are an important consideration in the operation of our business. However, in every Company there can be honest differences of opinion about working conditions, discipline, rules and policies. Employees are encouraged to bring forward grievances without fear of prejudice or penalty.

The policy goes on to describe a four step grievance procedure, each step involving a progressively more formal presentation at a progressively higher level of management. Step III, for example, reads as follows:

If the problem is not resolved within five (5) full working days of receiving an answer under Step II, the grievance may be presented in writing to the Employee Relations Supervisor. He will notify the department manager that a Step III grievance has been received and will convene a meeting(s) with supervision and the employee to review the grievance.

Note:

- (a) The employee may have a member(s) of the Office Committee or other salaried employee (not to exceed 2 fellow employees) attend the meeting with him.
- (b) If facts are not in dispute, the grievance meeting may be waived, with the agreement of the employee.

An answer is to be rendered by the Employee Relations Supervisor in writing within five (5) full working days.

7. Because of its importance to this case, the relevant portions of Policy H – 1, “Discipline”, are reproduced here in full:

I – POLICY

Rules and regulations are essential to the efficient operation of any company. Therefore, it is the policy of this Company to require adherence to its rules and to maintain a code of employee discipline which respects

the dignity of the employees and which aims at prevention rather than punishment.

II – PURPOSE

With the exception of situations which are cause for discharge (see Termination policy), the most important purpose of this policy is to bring about improvement or change in performance before a more serious stage is reached.

To provide a guideline to assist supervision in:

- a. Securing and maintaining (i) a high standard of conduct and productivity; (ii) a desirable level of employee morale through *fair rules, equitably but uniformly administered* and through the right to appeal disciplinary decisions.
- b. Making efforts to salvage the borderline performer changing him into a satisfactory and desirable employee.

III – PROCEDURE

Every person who has the responsibility of supervising people, assumes within that responsibility the role that must be carried out in the day-to-day coaching (criticizing, correcting and warnings) of his/her subordinates. However, each Foreman/Supervisor/Manager has the right and authority to decide how much guidance is to be given an employee before embarking on a formal series of steps designed to bring about change or, failing that, lead to discharge.

If the day-to-day coaching does not bring about the desired results and the formal stage is reached, it should follow a pattern similar to that set out in Section A (for bargaining unit employees) or Section B (for salaried employees) of the policy.

• • • •

B – Established Discipline Procedures (for salaried employees)

Step 1

This should be a formal discussion between the employee and his superior about the performance or behaviour re: 'the problem'. The employee should be reminded about previous informal talks and the need to improve.

Step 2

Another formal discussion should be held. The employee should be reminded again about former talks. The need to improve and past failure to do so should be stressed. If possible, specify a time within which improvement is expected.

Step 3 - (*see note)

At the expiry of the specified time, (or earlier, if warranted), a further formal discussion should be held, attended by the employee's superior, a representative of the Office Committee (at the employee's option), and the employee. Make reference to previous discussions and failure to date to show satisfactory improvement. A warning must be stated specifying that failure to show satisfactory improvement within a given period of time will be cause for reconsideration of the employee's continued employment.

The 'gist' of this discussion should be recorded in writing by the employee's supervisor. This written record will be forwarded to the Personnel Department for review with the employee's supervisor. A copy will then be provided to the employee (and to the Chairman of the Office Committee, if a representative was in attendance).

Step 4

If improvement is not achieved by the end of the specified time, the employee's superior will contact the Personnel Supervisor or Employee Relations Supervisor (if a supervisory employee, the Director of Personnel) to discuss the situation and jointly recommend a course of action.

This recommendation will be referred to the Vice-President of the function (and to the President, in the case of a supervisory employee) at which level agreement on a course of action will be reached. It is to be recorded in writing stating the performance and time requirements to be met to avoid discharge. After review of this record with the Personnel Supervisor or Employee Relations Supervisor, a copy will be provided to the employee (and the Office Committee, if appropriate).

Step 5

It is unlikely that a repeat of Step 4 could lead to any alternative except discharge. When a decision to discharge is reached, Personnel must be notified immediately.

*NOTE:

Before Step 3 disciplinary action is started on an employee, who has more than 10 years' service and/or who is a supervisory/management

employee, the situation shall be discussed with Personnel and referred to the appropriate Vice-President before action is taken.

(The underlining in paragraph II(a) appears in the original; "bargaining unit employees" refers to plant employees.)

8. Policy No. I - 1 is entitled "Termination of Employment". The relevant portions of that policy are as follows:

I - POLICY

It is the intent of the Company to provide continuous employment to all employees. However, conditions may arise which necessitate a termination of employment. When the lay off, discharge or resignation of an employee has been initiated by the Company, advance notice or pay in lieu of notice will be provided to the employee.

II - PURPOSE

To provide fair treatment to an employee whose employment has been terminated by the Company.

To encourage management to take prompt action whenever an employee fails to satisfactorily perform the duties of the job.

III - PROCEDURE

Sections: A - Voluntary Termination
 B - Involuntary Termination
 C - Exit Interview
 D - Termination Pay
 E - Vacation Pay
 F - References

A termination advice form will be initiated by the employee's superior showing the reason for termination.

Each termination will be classed under one of the following categories.

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B - Involuntary

(1) Discharge

The Company reserves the right to suspend or discharge any employee, without notice, for cause *including*:

- having or consuming intoxicants or unauthorized drugs on Company property;
- theft;
- disorderly, immoral or indecent conduct;
- continued absence or irregular attendance;
- habitual lateness;
- loitering during working hours;
- smoking in prohibited areas;
- insubordination or refusal to do work assigned;
- wilful or deliberate violation of safety practices or Company/Plant rules;
- any offence or combination of offences that, while not specifically listed, is considered to be serious or detrimental to the welfare of this Company, and/or its employees.

A discharge of a salaried employee must only be done following consultation with the Employee Relations/Personnel Supervisor. (Director of Personnel in the case of a management employee.)

Note:

The procedure for discharge for bargaining unit employee is established by the Collective Agreement and Discipline policy.

(2) Lay-off

• • • •

(3) Retirement

• • • •

(4) Death

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9. Johanne Kelly testified with respect to the history and use of the Policy Manual in Schneiders' dealings with its office employees. Ms. Kelly began her employment with Schneiders in August of 1967 as a clerk in the industrial engineering department. She is currently a financial analyst. She was the first Vice-President of the complainant trade union. Prior to that, and since 1975, she was the chairperson of the Office Committee referred to in the Grievance and Discipline policies quoted in paragraphs 6 and 7 of this decision.

10. Ms. Kelly was first elected to the Office Committee as a department representative in 1972. Between that time and the formation of the complainant trade union in late 1982, the number of departmental representatives on the Office Committee varied between seven and ten. Documentation which came into Ms. Kelly's possession when she became chairperson of the Office Committee includes a memorandum dated September 8, 1969, from Schneiders' then Director of Human Resources to members of office supervisory and management staff.

The memorandum announced the election by salaried office workers of a “new” Office Committee to replace a former Office Committee. It indicated that the Committee would be meeting together on a regular basis and that its members should be allowed time off from their regular duties to do so. It emphasized that the Office Committee was not a trade union, and would not have negotiating powers. However, the memorandum directed that proposed changes in routines or relocation of personnel were to be discussed by managers in an informative way with the Office Committee representative for their area. Major changes affecting the entire office force were to be discussed with the full Office Committee. The memorandum expressed the expectation that individual members of the Committee might approach supervisors on behalf of fellow office workers. Supervisors were urged to accept such representations in a positive spirit.

11. It was Ms. Kelly’s experience from and after 1972 that meetings and discussions of the kind described in the 1969 memorandum did take place from time to time. Indeed, in 1975 the Policy Manual was the subject of a number of meetings over the course of several months, at which the Office Committee and the respondent’s then Manager of Personnel, Ralph Misner, reviewed the Manual page by page. In the course of that review, the Office Committee asked for specific policies dealing with job posting and a grievance procedure. Such policies were formulated in 1975 and added to the Policy Manual at that time.

12. As chairperson of the Office Committee, Ms. Kelly was custodian of one of the existing copies of the Policy Manual. The procedure followed when Schneiders added or changed policies was that the new policy would be set out in a document issued in the form described in paragraph 5 of this decision, initialed by the President of Schneiders and circulated to Policy Manual holders for insertion in their manuals. When the policy document represented a revision of an existing policy, the covering memorandum requested that the policy holder replace the old pages with the new ones. Discussion with respect to a new or revised policy might take place between management and the Office Committee after the policy had been issued in this way; apart from the review in 1975, however, there was generally no prior discussion. It was understood that the amendment of existing policies or introduction of new policies in the manner described could not be the subject of a grievance under the grievance procedure, but that a failure to follow a policy “in force” could be. Ms. Kelly said that there had been difficulties from time to time in the application of existing policies, and that she had dealt with such difficulties at the stage at which a written grievance was to be submitted to the Personnel Department. She had handled submission of such grievances over the years when she had been chairperson of the Office Committee. Ms. Kelly admitted there might have been occasions when policies were not followed and the failure did not become the subject of a formal grievance because the affected employee chose not to grieve. There had also been occasions when it appeared that the job posting provisions had not been followed. On each such occasion, however, the Personnel Department had discussed the situation with Ms. Kelly and persuaded her that the apparent deviation was appropriate and, indeed, fell within the range of circumstances which the written policy on job postings expressly contemplated would justify a departure from the usual rules. Ms. Kelly also acknowledged awareness of inconsistencies in the application of the provisions of the overtime policy. She understood some employees had been required to take compensating time off, when the policy offered them the choice between time off and payment for overtime. This became the subject of a memorandum to supervisors dated November 2, 1983, in which Schneiders’ President, Ken Murray, said:

It would appear that the application of our Overtime Policy is not being consistently applied. The problem is with the application of overtime pay versus time-off in lieu.

I would urge you to re-read the policy and *ensure* that the policy is administered as written.

13. Whatever may have been the record of supervisory faithfulness to other policies, it was Ms. Kelly's uncontradicted evidence that, except in the grievors' cases, the discharge and discipline policies had always been followed "to a 'T'". By way of example, Ms. Kelly described a discipline meeting she attended with one of the office employees in late December, 1983 concerning that employee's lateness. In that meeting, the employee's supervisor had him read the Policy Manual's provisions regarding lateness. The supervisor prepared a written memorandum of the nature of the difficulty, which concluded with the words: "I will document this lateness and follow company policy until this matter is resolved." The employee in question was asked to sign the memorandum, and a copy of the signed memorandum was given to Ms. Kelly. Although this particular example occurred after certification and, indeed, after this complaint had been filed, there was no suggestion that what happened on this occasion was in any way unusual or affected by the certification or by the fact that this complaint was outstanding.

14. The grievors all had knowledge of and exposure to the Policy Manual. Mr. King said that he was given a copy of the Manual to read when he was hired in 1972. He also consulted it at a later time, when there was a death in his family. His supervisor circulated copies of revisions to policies when such revisions were issued. Ms. Lovell was hired in October, 1981. She was aware of the Policy Manual. When her uncle died, she asked her supervisor for the day off. He referred her to his secretary, who consulted the Policy Manual to see whether she could have the day off in those circumstances. Mr. Honsinger was shown the Policy Manual when he was hired in June, 1977. Ms. Grove was hired in February, 1980. She had seen and consulted the Manual with respect to personal problems. She had also borrowed the Manual from DeVrieze for the express purpose of obtaining authoritative information on the company's vacation pay and benefit provisions, so that these could be discussed with the vendor of a new payroll computer program. There was no suggestion that these experiences were atypical or unusual for employees in the bargaining unit.

15. Johanne Kelly said she had a discussion with the respondent's Vice-President of Human Resources, Jack MacNicol, in February, 1983, after the complainant's certification application had been filed. She asked him whether the Policy Manual was still in effect, and he gave her an unqualified "yes". MacNicol acknowledges a conversation in which he says he told Ms. Kelly that the Policy Manual continued to be a "framework", that each decision would be made on the merits, and that common sense rather than literal interpretation would apply. Ms. Kelly and Mr. MacNicol also described the purpose of the Policy Manual differently. Ms. Kelly thought of it as containing the employees' terms of employment, the rules by which they had to abide and the benefits they would get. It was, she said, "the bible". MacNicol preferred to describe it as a "guideline" for managers.

16. Mr. MacNicol's association with Schneiders is considerably shorter than Ms. Kelly's. He has been Vice-President of Human Resources at Schneiders only since April of 1982. Prior to that he was Director of Human Resources of the parent company, The Heritage Group

Inc., for three years. He confessed to having limited experience with the application of the Policy Manual in the period before the complainant filed its certification application. His first discussion of the Manual with the old Office Committee had occurred only shortly before the certification application was filed. He had suggested at that meeting that the Policy Manual required a thorough review. That review did not occur. In cross-examination he flatly denied that the policies in the Manual had been designed to be followed or that they provided a description of terms and conditions of employment. When it was suggested to him that the tone and content of Mr. Murray's memorandum of November 2, 1983 was inconsistent with his position in this regard, MacNicol countered that he had drafted that memorandum, and that its real purpose had merely been to de-fuse a bargaining issue which had arisen during collective bargaining.

17. In these circumstances, does section 79 of the Act require compliance with the provisions of this Policy Manual during the period of the "freeze"? The operation of the statutory freeze was described in *Laurentian University of Sudbury*, [1979] OLRB Rep. Aug. 767 in the following terms:

21. Section 70 [now 79], read as a whole, manifests a legislative intent to maintain the prior pattern of the employment relationship *in its entirety* while the parties are formalising their collective bargaining relationship or negotiating a collective agreement. This ensures that there will be a fixed basis from which to begin negotiations and preserves the status quo during the bargaining process. The status quo includes not only the existing terms and conditions of employment but also other established benefits which the employees are accustomed to receive and which can, therefore, be considered to be "privileges". It is clear that expressed promises, or a consistent pattern of employer conduct, can give rise to such privileges and they will be caught by the statutory freeze. As the Board noted in *St. Mary's Hospital*, [now reported at [1979] OLRB Rep. Aug. 795]:

"Section 70(2) preserves not only the employees' terms and conditions of employment, but also *privileges* which, by reason of custom and practice, have become a part of the employment relationship. The term "privilege" is extremely broad and extends to all of those benefits which an employee is accustomed to receiving but to which he is not legally entitled, and which cannot, therefore, be considered a "right". In order to determine whether a particular benefit, or aspect of the employment relationship, has become a privilege, it is necessary to examine the circumstances of each particular case, since privileges can arise from established custom, practice or policy. The question is an evidentiary one for, by definition, the Board's consideration must go beyond the strictly legal incidents of the relationship ('rights') and include those aspects of the relationship which give rise to 'privileges'.

In order to demonstrate the existence of a privilege, it is not necessary to establish a contractual right, a formal written policy, or an express promise. It is sufficient if there is an established, and well

entrenched, course of conduct which gives rise to the reasonable expectation that a benefit, previously given, will be continued.”

22. Section 70 is not a strait jacket which prevents an employer from responding to changing business conditions; it merely requires *both parties* to maintain the existing pattern of their employment relationship; that is, to conduct their relationship “as before”. In *Spar Aerospace Products Limited*, [1978] OLRB Rep. Sept. 859, the Board discussed the effect of section 70 in the following way:

“The ‘business as before’ approach does not mean that an employer cannot continue to manage its operation. What it does mean is, simply, that an employer must continue to run the operation according to the pattern established before the circumstances giving rise to the freeze have occurred, providing a clearly identifiable point of departure for bargaining and eliminating the chilling effect that a withdrawal of expected benefits would have upon the representation of the employees by a trade union. The right to manage is maintained, qualified only by the condition that the operation be managed as before. Such a condition, in our view, cannot be regarded as unduly onerous in light of the fact that it is management which is in the best position to know whether it is in fact carrying out business as before. This is an approach, moreover, that cuts both ways, in some cases preserving an entrenched employer right and in other cases preserving an established employee benefit.”

In *Spar* the Board decided that the practice of granting annual merit evaluation and increases was sufficiently well entrenched as to become a benefit, which the employees reasonably expected to receive and was, therefore, a “privilege” within the meaning of section 70 of the Act. In *Scarborough Centenary Hospital Association*, [1978] OLRB Rep. July 679, the Board found that section 70 prevented an employer from revoking the privileges of free parking during the currency of the freeze. On the other hand, in *AES Data Limited*, [1979] OLRB Rep. May 368, the Board found that the employer was entitled to re-assign job functions since, in that case, the subject employees could not reasonably expect to continue performing their jobs in exactly the same way despite changes in the mode of production and market conditions. A similar conclusion was reached in *Scarborough Centenary Hospital Association*, [1969] OLRB Rep. Jan. 1049, where the Board reaffirmed an employer’s right to make ordinary business and production decisions, i.e., to conduct its business as before. Finally, in *A. N. Shaw Restorations Ltd.*, [1978] OLRB Rep. June 479, the Board held that a union which had waived certain rights under its collective agreement could not adopt a different posture during a statutory freeze and insist upon compliance. Section 70 requires the Board to determine the pre-existing rights, privileges and duties of the parties, and then consider whether the conduct complained of alters those rights, privileges or obligations.

18. This is not the first case in which the Board has encountered a manual which purports to describe the employer's employee relations policies: see *Corporation of the Town of Petrolia*, [1981] OLRB Rep. Mar. 261; *Grey-Owen Sound Joint Homes for the Aged*, [1983] OLRB Rep. Apr. 522; *Ontario Hydro*, [1983] OLRB Rep. Sept. 1536; and, in a slightly different vein, *Laurentian University of Sudbury*, *supra*. It becomes unnecessary to search for an employer's policies in the pattern of its behaviour when the employer has published a description of those policies. That is not to say that the employer's past behaviour becomes irrelevant when such a document is found. The document may not define every aspect or element of the pattern of employment. Past practice may establish an additional frozen element on a subject untouched by the Manual, just as it can where an expired collective agreement establishes the basic pattern frozen by section 79: see, for example, *Wellesley Hospital*, [1976] OLRB Rep. July 364 and *Scarborough Centenary Hospital Association*, [1978] OLRB Rep. July 679. Similarly, a pattern of past behaviour may establish that a policy described in the document is not the policy applied in practice and should not, therefore, be treated as frozen and enforceable under section 79 (by way of analogy see *A. N. Shaw Restoration Ltd.*, [1978] OLRB Rep. June 479).

19. The Policy Manual before us addresses directly the pattern of the employment relationship between the respondent and its employees. It purports to describe substantial and significant portions of that pattern. The respondent took steps to ensure that new employees were aware of the existence, purpose and contents of the Policy Manual. It intended the Manual to be authoritative. It behaved as though it was authoritative, and instructed managerial employees to do the same. When the respondent intended to change the pattern it had created, it did so only by formally amending the contents of the Manual. While the respondent could have selectively ignored its own policies or permitted its managers the freedom to apply them on an *ad hoc* basis at their individual whim, it undertook, in effect, not to do so. By describing them as "guidelines", MacNicol would have us think the policies were optional. The words "guideline" and "guide" are used in the preamble to the Manual (see paragraph 5, *supra*), but use of these words in describing the policies need not lend them any optional flavour. A "guide" is "... one who directs another in his ways or conduct ..."; "to guide" is "to lead or direct in a course of action ... to conduct the affairs of (a household, state, etc.) ...". (The Shorter Oxford English Dictionary, Clarendon Press, Oxford (1973), p. 901). A "guideline" is "... an indication or outline of future policy or conduct (as of a government) ...". (Webster's Third New International Dictionary, G. & C. Merriam Company, Springfield, Mass. (1971), p. 1009). Read in context, the words "guide" and "guideline" as used in the Manual were obviously used in this imperative sense. Some of the policies in the Manual are skeletal; portions of others are expressly framed as suggestions or recommendations. Those policies might fairly be described as a "framework". The identification of common sense and the merits of an individual case as important factors in the application of these policies does not diminish Ms. Kelly's description of the Manual as "the bible" for this employment relationship. We do not accept that adherence to policies in the Manual was intended to be or held out to be "optional" in the sense suggested by MacNicol. We need not decide whether any or all of the provisions of the Policy Manual became terms of individual employment contracts enforceable at common law. We are satisfied that the Policy Manual in this case sets out terms or conditions of employment and rights, privileges and duties of the employer and employees within the meaning of section 79.

20. There was some evidence that the overtime policy was not consistently applied before the freeze. The respondent argued that the Board's "business as usual" approach should

therefore permit continued inconsistency in the application of the policies in the Manual. The evidence of deviation by individual managers from the overtime policy published by the respondent establishes neither an abandonment of that policy, or of the Policy Manual, by the respondent, nor the introduction of a new method of amending policies. While Mr. Murray's memorandum of November 2, 1983, is some evidence of a failure by some managers to apply the overtime policy as written, it is also evidence that such deviations were and remained unauthorized. Having repudiated prior managerial deviations from policy, the respondent can hardly claim that the authority to so deviate was legitimately part of the pattern frozen by section 79. In any event, evidence of deviation from policy, whether authorized or not, was limited to the overtime and, perhaps, job-posting policies. The respondent offered no evidence of any prior deviation from the discipline policy on which the complainant relies. In the absence of such evidence, we have no difficulty finding that the discipline and discharge policies as written in the Policy Manual were in fact the respondents' policies on those subjects at the time the statutory freeze came into effect.

21. The respondent argued that if the freeze preserves the Manual's policies, it preserves also management's prior "right" or "privilege" to change those policies without prior consultation with the Office Committee or, now, the complainant. We reject that contention. We have found that the prior pattern of the employment relationship did not afford individual managers discretionary authority to selectively ignore the respondent's published personnel policies. While the prior pattern did permit the modification of policies by written amendments authorized by the President and circulated to Policy Manual holders, that was not done before the onset of the freeze and could not, in our view, have been done thereafter without violating section 79. In an unorganized setting, an employer's ability to unilaterally effect changes in the pattern of his relationship with his employees is undoubted and substantial. If the employer's pre-freeze ability to unilaterally change wages and working conditions were to be treated as a right or privilege preserved by the terms of section 79, that section would be deprived of all meaning.

22. Accordingly, we find that section 79 of the Act operated to impose on the respondent the obligation not to discipline or terminate office and clerical employees except in accordance with the policies expressed in the Policy Manual and, particularly, the portions of policies H - 1 and I - 1 quoted in paragraphs 7 and 8 above. We must still determine whether the termination of the four grievors violated those policies. In order to assess that question, we must consider management's dealings with the grievors up to the point of termination and the reasons given by management for the terminations themselves.

23. DeVrieze could not remember the exact date, but thought the decision to terminate the grievors was made before August 24, 1983. He made the decision in consultation with Brant MacPherson, Gerry Fischer and Jack MacNicol. MacPherson was, at that time, DeVrieze's immediate superior. MacPherson, in turn, reported to Fischer, the company Comptroller. MacNicol testified that the policies in the Policy Manual were never considered when these men made the decision to terminate the four grievors. DeVrieze said that the grievors were terminated because they were incompetent, inflexible, and unable to adapt to the changes which had been taking place and would continue to take place in the information systems area of Schneiders. Schneiders had been changing from one computer system to another. The grievors and others had had various parts to play in the conversion process. DeVrieze described a number of tasks he had assigned to each of the grievors at various times, and

went on to explain how he felt each grievor's performance of the assigned tasks had been inadequate. It will be unnecessary to review his complaints in detail.

24. DeVrieze described his own style of management as "management by walking around"; each person who worked for him was described as "a resource". DeVrieze claimed to understand the concept of progressive discipline, but felt it was inapplicable to professional employees. He thought progressive discipline was all right for clerical employees, but felt that professionals were hard to discipline, and for that reason he had "difficulty with that policy". It was not clear whether he meant he had difficulty with Policy H – 1 in the Policy Manual, or difficulty with the idea of a policy of progressive discipline in dealings with professional employees. In any event, DeVrieze claimed that each grievor was aware, before the termination decision was made, that his or her continued employment was in question by reason of inadequate job performance. He was quite adamant on this point, despite his inability to pinpoint how and when each grievor would have received this information.

25. Each grievor said he or she had not received a *written* warning of any kind; they were uncontradicted in that respect. We heard no evidence that anyone produced or provided to any of these grievors any disciplinary documentation of the kind contemplated by Steps III and IV of the "Established Discipline Procedures (for salaried employees)" reproduced in paragraph 7 above. Each grievor was able to demonstrate that most, if not all, of the matters complained of by DeVrieze in his evidence had occurred prior to his or her having received a positive job evaluation, promotion or salary increase. With the exception of Honsinger, none of the grievors had had any warning of any kind, oral or written, whether pursuant to the discipline procedure or otherwise, that their employment at Schneiders was in jeopardy, and had no reason in September of 1983 to suppose that his or her performance was considered unsatisfactory by DeVrieze or his superiors. The evidence with respect to Mr. Honsinger is a good yardstick against which to test Mr. DeVrieze's contrary claims that all the grievors had been warned.

26. Unlike the other three grievors, Honsinger did acknowledge that his job performance had undergone a significant decline in the months prior to his termination. His wife had given birth to a son in January of 1983. The child was born with a serious health problem, and died four months later. During and after that four-month period, Mr. Honsinger's distraction and the deterioration in his work performance were evident both to him and to Mr. DeVrieze, who responded with apparent compassion. He reassigned Honsinger to less demanding, less critical projects. He offered Honsinger the opportunity to take time off to come to grips with his personal tragedy. The first offer of that kind was made before the summer of 1983. Honsinger remained at work. On August 22, 1983, however, DeVrieze told Honsinger he was to be moved from the office he was in to a less desirable office, as there were others "more deserving" of the use of Honsinger's office. DeVrieze also told Honsinger that "if you don't pick up your socks, you're out". This was the first and only warning Honsinger ever received. Up to this point Honsinger was under the impression that DeVrieze was prepared to bear with him while he dealt with his personal problems. Honsinger reacted negatively to the proposed office move. He spoke to his union representatives, and a meeting was arranged August 24, 1983, involving Honsinger, DeVrieze, and trade union officials Judy Sussanna and Gidge Trepanier. DeVrieze was asked whether Honsinger was to be terminated. DeVrieze said "no". He suggested that Honsinger take time off – as much as he needed to take to "get his act together". DeVrieze said he would take care of any company problem concerning Honsinger's absence, and that he would guarantee Honsinger's job would be there

when Honsinger returned. Honsinger took DeVrieze at his word. He left work, obtained professional assistance and, on the advice of those professionals, returned to work a week and a half later, in early September.

27. DeVrieze admits that the decision to terminate Honsinger had been made before he met with Honsinger August 24th. He did not then tell Honsinger he was to be fired. He could point to no occasion thereafter when he had in any way qualified the "guarantee" given at the August 24th meeting. He could point to no meeting at which he had expressly told any of the grievors that their job was on the line because of their performance to date. Despite this, DeVrieze said he thought they ought to have known they might be fired. MacNicol told us that the grievors should have been aware that termination was a possibility, because there had been earlier terminations and the office was functioning in an atmosphere in which everyone was "looking over their shoulder". We heard evidence that there had been terminations and demotions among managerial personnel responsible for the area in which the grievors worked. We have also the uncontradicted evidence of the grievors concerning a meeting on September 1st or 2nd at which one of those events, the *de facto* demotion of Brad MacPherson, was announced. After that meeting, DeVrieze asked his department to stay. He told that group (which included the grievors other than Honsinger) that they should not take MacPherson's demotion as indicating that management was displeased with their performance. Indeed, DeVrieze told them that top management was pleased with the conduct of the projects they were working on at that time. The only conclusion the grievors could be expected to have drawn from all of this was that the company was concerned about the competence of its managers.

28. We expressly reject DeVrieze's assertion that the grievors knew their jobs were on the line before the decision was made to terminate them. The discipline procedure set out in the Policy Manual requires clear, unambiguous and, ultimately, written communication to employees of any management concerns with their performance and of specific requirements for improvement, before any failure to perform or improve becomes the subject of a termination decision. We do not accept that these requirements were in any way satisfied by some process of osmosis, or that the grievors could be expected to receive critical messages despite the reassuring words and conduct of Mr. DeVrieze. We find that there was a total failure by the respondent to follow policy H - 1 in its dealings with the grievors. Indeed, we find that prior to their termination King, Lovell and Grove had no reason to think that their employment was in jeopardy by reason of the respondent's assessment of their job performance. While Honsinger had an oral warning to that effect on August 22nd and 24th, someone had by that time already decided that he and the other grievors would be terminated. The opportunity to improve DeVrieze offered at that point was a total sham. If Schneiders' management had earlier lost patience with Honsinger's struggle to come to terms with his grief, this was not a message DeVrieze had been willing or able to convey to Honsinger. If Schneiders' management was sufficiently dissatisfied with the work of the other three grievors to consider their termination for that reason, DeVrieze made no effort to alert the grievors and provide the constructive criticism and objective standards from which both they and their employer might ultimately have benefited. In short, Schneiders, through DeVrieze, failed to manage its human resources in the manner contemplated by the personnel policies initialled by its President. This failure to follow even the spirit of the discipline policy in the case of these four grievors becomes all the more curious in light of evidence that a fifth termination was under consideration in

the summer of 1983. Larry Stecho was an intermediate programmer analyst in the same department. As far as DeVrieze was concerned, he was also “not working out”. Stecho, however, was not terminated. DeVrieze met with him, told him his job was on the line and offered him the opportunity to improve. DeVrieze distinguished his treatment of Stecho by saying that Stecho was not a “professional”. DeVrieze took this approach in Stecho’s case, he said, because Stecho did not have the same formal training and practical experience as the four grievors, and would have a harder time getting another job. While an assessment of that sort might form part of an estimate of Schneiders’ potential exposure to damages for wrongful dismissal, it does not justify abandonment of Policy H – 1 with respect to professionals.

29. We find that, in terminating the grievors, Schneiders’ failed to follow either the letter or the spirit of its Discipline policy, Policy H – 1. It is therefore unnecessary to decide whether substantial compliance or compliance with the spirit of the policy would have been enough to satisfy the requirements of section 79. However, the respondent argued that the Policy Manual offered management a choice of applying either its Discipline policy, H – 1, which requires a series of warnings not given here, or its Termination of Employment policy, I – 1, which, it argues, permitted the respondent to discharge the grievors “for cause” without first exhausting the procedure prescribed by the Discipline policy. The language relied on appears in section III B(1) of Policy I – 1 as follows:

The Company reserves the right to suspend or discharge any employee, without notice, for cause *including*:

• • • •

The list set out thereafter (and reproduced in paragraph 8 above) does not expressly describe the reasons given by DeVrieze for termination of these grievors. The respondent relies upon the word “including” to sweep in those reasons. The quoted language, however, purports only to “reserve” a right. The right reserved is the right of an employer at common law to discharge for cause without notice. It is no more broad than that, and would not take in the reasons offered by DeVrieze, even if we found them more believable than we do. In addition, we are satisfied that the word “including” was meant to sweep in only causes which are of the same nature as those set out in the list. None of DeVrieze’s complaints were in that class. We are satisfied that there was in this case no cause which would have justified the discharge of any of the grievors without notice within the meaning of Policy I – 1.

30. The complainant argued that the reverse onus provisions of section 89(5) apply here, where it is alleged that the discharge of an employee violates section 79 of the Act. While the Board’s decisions in *Bell Shirt Company Limited*, [1978] OLRB Rep. Apr. 373 and *Merymount Children’s Home*, [1981] OLRB Rep. June 742 suggest that the section 89(5) onus does not apply to the alleged breach of section 79, this view was doubted in *Wilco-Canada Inc.*, [1983] OLRB Rep. Jan. 165 (at ¶10). The question was not resolved in *Wilco-Canada, Inc.*, and it is unnecessary for us to do so here, since the complainant has established its case on a balance of probabilities.

31. We find that the termination of these grievors violated the *Labour Relations Act*. That finding is not the result of applying any abstract or personal standard of fairness to the actions of the employer. What we have applied are Schneiders’ own self-imposed standards of procedural and substantive fairness – the standards Schneiders told its employees they could

expect it to apply in its dealings with them. Section 79 of the *Labour Relations Act* requires that an employer maintain its own pre-freeze standards for the duration of the freeze; the section does not preserve any employer "right" or "privilege" to abandon those standards.

32. Having found that the termination of the grievors violated section 79 of the Act, what is the appropriate remedy? Section 89(4) of the Act provides that:

... where the Board is satisfied that an employer ... has acted contrary to this Act it shall determine what, if anything, the employer ... shall do or refrain from doing with respect thereto and such determination, without limiting the generality of the foregoing may include ... any one or more of,

• • • •

- (c) an order to reinstate in employment or hire the person or employee concerned, with or without compensation, or to compensate in lieu of hiring or reinstatement for loss of earnings or other employment benefits ...

The complainant asks that we order the reinstatement of the grievors and require that they be compensated for earnings and other employment benefits lost. We are satisfied that that would be an appropriate remedy in this case. Reinstatement, we note, would not afford the grievors a guarantee of continued employment with Schneiders. It would, however, restore to them the benefit of their employer's discipline policy for so long as it remains in force. The grievors are also entitled to compensation for the earnings and other employment benefits lost as a result of the respondent's breach. That compensation shall include interest, in accordance with the principles outlined by the Board in *Hallowell House Limited*, [1980] OLRB Rep. Jan. 35.

33. The complainant also asks that we order the respondent to sign and post notices to employees advising them of the Board's decision, the rights upheld thereby and the employer's undertaking to respect and comply with both. A "posting remedy" was first awarded by the Board in *Radio Shack*, [1979] OLRB Rep. Dec. 1220. Judicial review of the use of that remedy was denied in *Re Tandy Electronics Ltd. and United Steelworkers of America et al.*, (1980) 30 O.R. (2d) 29; 80 CLLC ¶14,017 (Ont. Div. Ct.). The rationale for the remedy and its use were elaborated in *Valdi Inc.*, [1980] OLRB Rep. Aug. 1254 at paragraph 24:

However, the impact of unfair labour practices are seldom confined to an economic impact. For example, the isolated dismissal of an employee in the midst of or at the outset of an organizing campaign is likely to have a significant "chilling effect" on other employees who witness the incident and understand its origin. The dismissal of a fellow employee for union activity conveys a strong warning to other employees and can bring a stop to an ongoing drive in its tracks. The mere reinstatement of the employee directly affected, with backpay some time later, may do little to assure his or her fellow employees that the employer is prepared to live within the requirements of the statute and that effective remedies exist for those occasions where he will not.

... We would add that our concern for remedial effectiveness is not limited to situations where employers are respondents. Trade unions have important obligations under the statute as well and individual employees who are mistreated by them must also be assured of future lawfulness. One of the unique remedies developed by labour relations agencies to respond to the psychological impact of unfair labour practices requires the offender, whether employer or union, to communicate to employees affected by an unfair labour practice that it has been found guilty of violating statutory labour laws and that it will henceforth conform to their requirements. ... However, we believe the posting of notices should not be confined to exceptional cases because isolated violations of the Act have an undoubted and significant psychological impact on labour relations and the attainment of the statute's objectives. Making employees aware of the fact that an errant employer or trade union cannot violate the Act and that the employee has meaningful legal rights is vital to the success of *The Labour Relations Act*. Admittedly, the effect of the posting requirement often will be difficult to evaluate but this is no reason for inaction. Surely, for example, the fear for job security will be lessened with the realization that someone more authoritative than the employer has a voice in determining what he can do to those who support a trade union and that someone more powerful than a trade union will protect those who lawfully oppose it. Even a belated notice is better than none, if it helps to dispel any fears, confusion or ill-will created by a situation which has been equitably resolved.

The grievor in *Valdi* was a recently elected union steward whose termination, the Board found, had been motivated by the grievor's election to and performance of the duties of that office. As a result, the language of the passage quoted is most appropriate to an analysis of the effects of and proper remedial response to unfair labour practices in which improper motivation plays a part. Is improper motivation a necessary prerequisite to the use of this remedy? We think not. The object of a posting is to reassure employees that the respondent, whether employer or trade union, will thenceforth conform to the requirements of the *Labour Relations Act*, and that effective remedies exist and will be brought to bear when these requirements are not met. A violation which results from ignorance or disregard of the rights and freedoms protected by the *Labour Relations Act* can adversely impact employee faith in those protections, even in the absence of improper motivation. This effect extends to employees other than the direct victims of the improper conduct, and the posting remedy is intended to redress that effect. The remedy for trade union violations of the duty of fair representation in section 68 of the Act, for example, has included a posting order even where there was no allegation or finding that the trade union harboured any subjective ill-will toward the employee complainant: see *North York General Hospital*, [1982] OLRB Rep. Aug. 1190; *Savage Shoes Limited*, [1983] OLRB Rep. Dec. 2067.

34. The Board is not always asked for a posting order where the complaint alleges a violation of section 79 unaccompanied by improper motivation. Where the request has been made, the Board has granted it in some cases (*Hotel Canadiana*, [1980] OLRB Rep. Aug. 1210; *Cloverleaf Hotel*, [1981] OLRB Rep. June 630; *Merrymount Children's Home*, [1981] OLRB Rep. June 742) and denied it in others (*Homewood Sanitarium of Guelph, Ontario, Ltd.*, [1982] OLRB Rep. Feb. 230; *Le Patro d'Ottawa*, [1983] OLRB Rep. Feb. 244). The

considerations which led the Board not to grant a posting order in the *Homewood Sanitarium* case are set out in paragraph 10 of that decision:

We do not consider that a posting order would be appropriate in the circumstances of this case. It appears from the submissions of the parties that the respondent Hospital misconceived the requirements of section 79 of the Act and believed, in good faith, that the provisions of that section prevented it from altering the wages of the organized nurses. In this instance there has been a technical violation of the section, with no evidence of any deliberate attempt to chill union support. In these circumstances the Board will not normally make a posting order. There is no reason to believe that a declaration coupled with an order for compensation will not fully redress the wrong that has occurred.

In the case before us, the violation did not result from a good faith attempt by the employer to comply with its obligations under section 79. Here, the respondent gave no thought to those obligations. It abandoned a long-standing personnel policy which provided its office employees, or at least appeared to provide them, with some of the security of a right not to be discharged without just cause, one of the benefits usually won by trade unions in collective bargaining. Whatever may have been the respondent's subjective intent in abandoning that policy at the time it did, when it was subject to both the statutory freeze and the obligation to bargain with the complainant, the likely objective result was to instill in the newly-organized employees the fear that important benefits they enjoyed before certification could be tossed aside at the caprice of the respondent's managers, despite the bargaining process and the protections of the *Labour Relations Act*, while that Act still restrained the employees from responsive collective job action. The breach cannot be described as "technical" in the sense employed in *Homewood Sanitarium*. Where the result is the loss of 4 jobs without warning or explanation, a full remedy must include redress of the adverse impact on employee perception of the collective bargaining system. Accordingly, there will be an order that the respondent post a suitably worded Notice to Employees.

35. In the result, the Board directs the respondent J. M. Schneider Inc.:

- (a) to immediately offer to reinstate Philip Honsinger, Philip King, Barbara Lovell and Martha Grove to the positions each occupied prior to his or her termination on September 13, 1983;
- (b) to fully compensate Philip Honsinger, Philip King, Barbara Lovell and Martha Grove for all earnings and employment benefits lost by them as a result of the respondent's violation of the Act, such compensation to include interest to be calculated in the manner described in Practice Note No. 13; and
- (c) to post copies of the attached notice marked "Appendix", duly signed by an authorized officer of the respondent, in conspicuous places on its premises where it is likely to come to the attention of the employees represented by the complainant, and keep the notices posted

for sixty consecutive working days, and take reasonable steps to ensure that the notices are not altered, defaced or covered by any other material.

36. The Board remains seized of this matter in the event of any dispute between the parties concerning the interpretation or implementation of this decision including, without limitation, the calculation of the compensation and interest awarded to the grievors.

Appendix

The Labour Relations Act

NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

WE HAVE POSTED THIS NOTICE IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD ISSUED AFTER A HEARING IN WHICH WE AND THE SCHNEIDERS OFFICE EMPLOYEES ASSOCIATION PARTICIPATED. THE ONTARIO LABOUR RELATIONS BOARD FOUND THAT WE VIOLATED THE LABOUR RELATIONS ACT BY NOT COMPLYING WITH THE PROVISIONS OF OUR POLICY MANUAL IN OUR DEALINGS WITH AND TERMINATION OF PHILIP HONSINGER, PHILIP KING, BARBARA LOVELL AND MARTHA GROVE.

THE LABOUR RELATIONS ACT PROVIDES THAT WHERE A TRADE UNION REPRESENTS EMPLOYEES AND HAS GIVEN WRITTEN NOTICE OF ITS DESIRE TO BARGAIN WITH A VIEW TO MAKING A COLLECTIVE AGREEMENT WITH RESPECT TO THOSE EMPLOYEES AND NO COLLECTIVE AGREEMENT IS IN OPERATION, THE EMPLOYER SHALL NOT, EXCEPT WITH THE CONSENT OF THE TRADE UNION, ALTER THE RATES OF WAGES OR ANY OTHER TERM OR CONDITION OF EMPLOYMENT OR ANY RIGHT, PRIVILEGE OR DUTY OF THOSE EMPLOYEES OR THE EMPLOYER, UNTIL THE MINISTER OF LABOUR HAS APPOINTED A CONCILIATION OFFICER OR MEDIATOR UNDER THE LABOUR RELATIONS ACT AND,

- (1) SEVEN DAYS HAVE ELAPSED AFTER THE MINISTER HAS RELEASED TO THE PARTIES THE REPORT OF A CONCILIATION BOARD OR MEDIATOR, OR
- (2) FOURTEEN DAYS HAVE ELAPSED AFTER THE MINISTER HAS RELEASED TO THE PARTIES A NOTICE THAT HE DOES NOT CONSIDER IT ADVISABLE TO APPOINT A CONCILIATION BOARD,

WE ASSURE OUR EMPLOYEES THAT:

WE WILL HENCEFORTH COMPLY WITH THESE REQUIREMENTS.

WE WILL IMMEDIATELY OFFER TO REINSTATE EACH OF PHILIP HONSINGER, PHILIP KING, BARBARA LOVELL AND MARTHA GROVE TO THEIR FORMER POSITIONS.

WE WILL PAY EACH OF PHILIP HONSINGER, PHILIP KING, BARBARA LOVELL AND MARTHA GROVE COMPENSATION FOR ANY EARNINGS OR BENEFITS LOST AS A RESULT OF OUR BREACH OF THE ACT, PLUS INTEREST.

J. M. SCHNEIDER INC.

PER: _____

This is an official notice of the Board and must not be removed or defaced

This notice must remain posted for 60 consecutive working days.

**1773-83-R Labourers' International Union of North America, Local 1059, Applicant,
v. Joe Franze Concrete Ltd., Respondent**

Practice and Procedure – Related Employer – Related employer declaration requiring balancing of erosion of bargaining rights and sweeping in of employees to union – Alleged related employer's competition minimal – No real possibility of loss of jobs for union – Board not exercising discretion to make declaration in circumstances [This decision was inadvertently omitted from the December, 1983 issue: Editor]

BEFORE: Richard M. Brown, Vice-Chairman, and Board Members B. L. Armstrong and J. D. Bell.

APPEARANCES: *D. Strang and M. Ries for the applicant; D. Janes Forbes-Roberts and J. G. Knight for the respondent.*

DECISION OF THE BOARD; December 20, 1983

1. In this application under section 1(4) of the *Labour Relations Act*, the Labourers' International Union, Local 1059 (hereinafter the "union") seeks a declaration that J. Franze Concrete Ltd. (hereinafter "J.F.C.") and A. J. Concrete Ltd. (hereinafter "A.J.C.") constitute one employer.

2. As the company name suggests, J.F.C. is engaged in concrete work, including the installation of curbs, sidewalks, patios and driveways. This work is performed within a sixty mile radius of London and produces a gross income of approximately half a million dollars annually. Twenty-nine people were on the company's payroll during 1983, at one time or another. J.F.C. is owned by Joseph Franze and his spouse who are also the only corporate officers. The company was formed in early 1982, but Joseph Franze carried on a similar business in his own name between 1978 and 1982. Neither Franze nor J.F.C. have ever been a party to a collective bargaining relationship with the union.

3. Angelo Fortese, Joseph Franze's brother-in-law, is the president and sole shareholder of A.J.C. which was established in March, 1983. Fortese invested eight hundred dollars to pay the legal costs of incorporation and he borrowed a further one hundred and forty dollars from Franze; these are the only monies ever invested in the company. Shortly after A.J.C. was formed, and before it had any employees, Fortese voluntarily recognized the union. He testified that the company was launched because there were no unionized concrete firms in the area, and he saw an attractive opportunity for someone with a collective bargaining relationship to win the business of unionized general contractors, who are obliged to contract only with organized subcontractors.

4. Since August, 1981, Fortese has been employed by J.F.C. as a working foreman; he continues in that employment. He does not have the power to hire or fire workers, cannot grant fellow employees more than a few hours of time away from their jobs, and is paid on an hourly basis.

5. Over the eight months of A.F.C.'s corporate life, it has bid upon only one very small project, the installation of a sidewalk at 850 Adelaide Street in London. This job was

performed for the Consortium Group in June 1983, at a price of \$1,550.00. J.F.C. had previously performed work for the Consortium Group, most recently in the spring of 1982. According to Franze, Robert Summerfield, the construction supervisor for the Consortium Group, telephoned him in April, 1983 to obtain a price quotation for 850 Adelaide Street, and Franze referred Summerfield to A.J.C., because the union had previously objected to J.F.C.'s presence on this site. Summerfield testified that he had heard that Fortese had formed a "union company", and that he called Franze to "liaise" with Fortese. Fortese prepared a bid which Franze reviewed before passing it on to Summerfield. The job was performed in June, 1983 by Fortese with the assistance of L. Vecchio and F. Lepore who each worked a total of between five and seven hours. They are regularly employed by J.F.C., but, according to Fortese, he utilized their services at a time when J.F.C. did not need them. They were paid by A.J.C. for working at 850 Adelaide Street. Both Fortese and Franze denied that the latter worked on this job, although a union steward testified that he saw Franze on the site with a shovel in his hand. Fortese also borrowed a front-end loader and a pickup truck from J.F.C. for one or two days. A.J.C. purchased the concrete from which the sidewalk was constructed, and A.J.C. was paid by the Consortium Group for this work. Joseph Franze testified that, except for the initial discussions in April, he had no dealings with the Consortium Group about the sidewalk project. According to Franze, after the Adelaide Street job was finished, J.F.C.'s services were again requested by the Consortium Group, and he redirected the inquiry to A.J.C.

6. The union now seeks to establish bargaining rights for the employees of J.F.C., relying upon section 1(4):

Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, they may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or association or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

Counsel for the union referred us to two cases – *J. H. Normick Inc.*, [1979] OLRB Rep. Dec. 1176 and *Donald A. Foley Limited*, [1980] OLRB Rep. Apr. 436 – in support his contention that J.F.C. and A.J.C. carry on "associated or related activities or businesses ... under common direction and control". However, we make no determination as to whether or not these criteria have been met, because we would not exercise our discretion by treating these two corporations as one employer in any event.

7. Section 1(4) is most often utilized by this Board to preserve bargaining rights. In the typical case, an employer whose work force is represented by a trade union sets up a new corporate entity to engage in the type of work that was previously done according to the terms of a collective agreement. New business is then diverted to the unorganized enterprise, and there is a consequent reduction in the number of employees working under the collective agreement. The union soon learns of the employer's new venture and initiates legal proceedings. This is a clear example of the evil that section 1(4) was designed to remedy, and the

Board has invoked this provision to ward off such a threat to bargaining rights. Since the non-union company is freshly established, it does not have an established work force of unorganized employees whose opposition to trade unionism must be weighed in the balance.

8. An erosion of bargaining rights is clearly established when the creation of a non-union firm causes a drop in the number of employees working for an organized enterprise. But any causal relationship is not always easily demonstrated. Even when the volume of business done by the unorganized venture grows, as the business activity of the other falls off, the circumstances may be such that one cannot determine with certainty what impact the non-union company has had on its commercial sibling. In other words, there may be no way of ascertaining whether, but for the existence of the unorganized firm, its customers would have dealt with the union company or with other non-union enterprises.

9. The potential for a loss of union jobs to a non-union company is clearest when the number of organized employees actually falls. But the right of a bargaining agent to represent employees can be undermined in a less obvious way. Consider a business that is expanding rapidly. If the existing firm hires employees to staff this expansion, they would be represented by the union, assuming that they fall within the confines of the bargaining unit. Instead of following this course, management decides to channel this growth into a new, unorganized venture, so that the level of employment at the parent enterprise remains unchanged. Once again the union's bargaining rights are potentially undercut, but this time the impact is felt by those seeking union jobs in the future, rather than persons already employed under a collective agreement. The detriment to prospective employees is particularly troublesome in industries like construction where most union members are continually moving from one employer to another.

10. At the other end of the spectrum lie commercial arrangements that pose no threat to a subsisting collective bargaining relationship. In *Farquhar Construction Limited*, [1978] OLRB Rep. Oct. 914, the union represented the work force of a company carrying on business as a general contractor; a second, unorganized company manufactured mobile building units. The Board found that the collective agreement applied only to construction, not to manufacturing. As the union was not entitled to represent employees engaged in manufacturing, the establishment of the new company did not jeopardize existing bargaining rights. By refusing to treat the two companies as one employer, the Board recognized the right of the unorganized manufacturing employees to decide whether or not to engage in collective bargaining.

11. We have reviewed both the situation where the preservation of bargaining rights is the only policy objective, and the converse setting in which there is no threat to a collective bargaining relationship. In the middle ground, between these extremes, public policy must weigh any jeopardy to a union's bargaining rights against the countervailing objective of not sweeping employees into a bargaining unit against their wishes.

12. The tension between these two, competing purposes was nicely captured in *D. L. Stevens Contracting Niagara Limited*, [1978] OLRB Rep. June 531 in which the employees of two construction companies carrying on parallel businesses were represented by different labour organizations – the Christian Labour Association of Canada (CLAC) and the United Brotherhood of Carpenters and Joiners of America. This situation had existed for six years when the Carpenters sought a declaration, under section 1(4), that its collective agreement bound both companies. From the Carpenters' point of view, the CLAC company was as much

a threat to existing bargaining rights as a non-union company would have been. Yet the Carpenters' claim ran head on into the interests of the CLAC work force, made up of long-term employees. To recognize the Carpenters as their bargaining agent, would be to force them to choose between accepting this union against their will and leaving their jobs. (Indeed, CLAC, acting on their behalf, had as strong a claim to section 1(4) relief as did the Carpenters). Not surprisingly, the Board dismissed the Carpenters' application. See also *W.M.I. Waste Management of Canada Inc.*, [1981] OLRB Rep. Mar. 409.

13. A similar and more common fact pattern involves two companies, one organized and the other not, that have carried on parallel businesses for a period of years before the union seeks a section 1(4) declaration. In several such cases, the Board has dismissed an application on the grounds that the union had long been aware of the relationship between the two companies: see *H. Allaire and Sons Company Limited*, [1974] OLRB Rep. July 457; *Inducon Construction of Canada Limited*, [1975] OLRB Rep. Apr. 399; and *Zaph Construction Ltd.*, [1977] OLRB Rep. Nov. 741. This approach ensures that any reliance on the union's acquiescence, on the part of management or unorganized employees, is not rudely unsettled.

14. In *Bramalea Carpentry Association*, [1981] OLRB Rep. July 844, the union neither knew, nor could reasonably have known, of the longstanding connection between two corporations engaged in the same business. The Board refused to disrupt the industrial relations status quo, in part, because the permanent employees of the non-union company had not demonstrated any desire to join the union. The other reason given for not applying section 1(4) was the absence of any concrete evidence that bargaining rights had been eroded. In this respect, the Board made several observations: there was no interchange of employees; there was no indication that work "actually intended" for the union firm was "redirected" to the other enterprise; and the non-union firm was several years older than its unorganized sibling. As the two enterprises performed precisely the same kind of work, the established facts did not negate the very real possibility that the non-union company had in the past, and would in the future, attract customers who would have, but for its existence, gone to the union firm. But the Board gave greater weight to the interests of the unorganized employees than to this potential threat to bargaining rights. See also *Mandic Bros. Drywall and Const. Ltd.*, [1982] OLRB Rep. May 693.

15. This does not mean that the Board will never apply section 1(4) to a non-union company that has operated in tandem with a union firm for several years. In *M. J. Guthrie Construction Limited*, [1982] OLRB Rep. Sept. 1332, one person carried on business as both a unionized general contractor and as an unorganized sub-contractor, an arrangement in which the union had acquiesced for over twenty years. The employer then wound up the union enterprise, and certain types of work which it had previously performed were taken up by the other company, which also continued to do the work it had done before. The Board stated that the union would have been denied relief, because of its delay, if the two companies had simply carried on as in the past, but that the new arrangement was sufficient reason to entertain the application. Finding that union jobs had been lost to the non-union firm, the Board issued a section 1(4) declaration, even though it acknowledged that the result was to increase the number of people represented by the union. The decision does not clearly indicate whether those who would be swept into the bargaining unit were employees of longstanding, were engaged shortly before the ruling, or would be hired after the decision was handed down.

16. In the case at hand, there is no real possibility that competition between J.F.C. and

A.J.C. has led, or will lead in the near future, to a loss of union jobs. A.J.C.'s business activity to date – \$1550 of income and approximately twelve hours of labour is so negligible that there are no bargaining rights of any substance to be lost. Moreover, to grant this application would be to ride roughshod over the wishes of J.F.C.'s twenty-nine employees who have not expressed any desire to be represented by the union. In summary, this case presents a text book example of a situation in which the Board ought not to apply section 1(4). The application is dismissed.

1270-83-R; 1112-82-R The Public Service Alliance of Canada, Applicant, v. Ralson Construction a Division of **Maplegrove Building Specialties Limited**, Respondent

Employee – Security Guard – Duties concerned with protection of property from visitors and intruders – Performing some duties other than protection of property – Not guards – Supervisor of security services not managerial

BEFORE: Richard M. Brown, Vice-Chairman, and Board Members J. A. Ronson and S. Cooke.

APPEARANCES: *Michael Gleeson and David R. Doyle for the applicant; W. J. Hanson and D. Shift for the respondent.*

DECISION OF THE BOARD; April 19, 1984

1. This is an application for certification.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
3. Having regard to the agreement of the parties, the Board finds the following unit to be appropriate for collective bargaining: all employees of the respondent at Moose Factory, save and except the manager, persons above the rank of manager, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period. For the purposes of clarity, the Board notes the agreement of the parties that Roy McLeod, the current superintendent for maintenance, is a manager. We also note that this application does *not* pertain to employees engaged in the construction industry.
4. The respondent contended that nine of the individuals for whom the applicant seeks bargaining rights are guards within the meaning of section 12 of the *Labour Relations Act*. An inquiry into the duties performed by these individuals was conducted by a Board Officer and his report is now before us. The parties agreed that the duties performed by K. Cheechoo and L. Corston, the two employees examined by the Board Officer, are representative of the duties performed by others.
5. The employees concerned work at the Moose Factory Hospital on three shifts around the clock. One person is on duty during the day from Monday to Friday; two employees are

present at all other times. The duties performed vary from shift to shift. A single person working on weekdays spends a substantial amount of time driving the hospital ambulance which apparently does double duty as a taxi for the transportation of patients and medical personnel. Kenneth Cheechoo estimated the portion of time devoted to this task as eighty percent. (Cheechoo conceded that less time was spent driving the ambulance on other shifts. Without distinguishing between shifts, Leonard Corston estimated the proportion of time devoted to this task as 25 per cent.) The grounds and buildings are patrolled when time permits. As a receptionist is on duty during the day from Monday to Friday, the single guard working at this time is not stationed at the entrance to the hospital. At other times, when there is no receptionist present, one of the two guards on duty is stationed at the front entrance. He answers the telephone, pages staff, and ensures that visitors sign a log book. The other guard makes three rounds of the hospital, checking to ensure that the appropriate doors are locked, and responds to calls for the ambulance.

6. On all shifts, employees are required to enforce hospital rules requiring all visitors to leave at 9:00 p.m. and banning alcohol from the premises. According to Kenneth Cheechoo, he and his colleagues monitor visitors to be sure that they are not carrying alcohol. Leonard Corston testified that if a drunk employee tried to enter the hospital he would be stopped; this has never occurred to date. Similarly, Corston testified that he would investigate if he observed someone acting suspiciously while carrying something out of the hospital; this too has not occurred to date. According to Kenneth Cheechoo, one month before he was examined by a Board Officer, the employees were authorized to check packages carried out of the hospital by employees. (The examination was conducted on November 23, some three months after the application for certification was filed.) However, Cheechoo has never stopped anyone who was carrying something out of the hospital. He testified that he did not have the authority to physically search a person or to search vehicles. The employees in question wear uniforms and are licensed under the *Private Investigators and Security Guards Act*.

7. Section 12 of the Act refers to "a person employed as a guard to protect the property of an employer". To determine who falls within this description, the Board has consistently looked to the purpose underlying the statutory language. The objective is clearly not to deny the fruits of collective bargaining to persons employed to protect the property of an employer. The obvious reason for separating guards from other employees, as contemplated by section 12, is to prevent any alliance between these two groups which might impair the diligence with which guards protect the property under their care against other employees. Accordingly, a guard is someone performing duties which create a conflict between that person's loyalty to employees who pose a threat to property and his duty to the employer who owns it. A person engaged in monitoring employees, perhaps by searching their lunch pails or vehicles, is obviously a guard. Conversely, someone hired to safeguard property from vandals at large, as opposed to employees, is not a guard. See *Metropol Security Limited*, [1980] OLRB Rep. Dec. 1755; and *Wells Fargo Armcar, Inc.*, [1981] OLRB Rep. July 1046 upheld sub nom *Wells Fargo Armcar, Inc. v. Ontario Labour Relations Board* (1982), 36 O.R. (2d) 361 (Div. Ct.). Interpreting the word guard, the Board also has recognized that many employees are under some obligation to protect their employer's property; not everyone charged with some such responsibility is a guard. The duties of a guard are of a higher order, as the Board observed in *Geo. A. Crain & Sons Ltd.*, 63 CLLC ¶16,291.

8. In some cases, the employees concerned are clearly engaged in protecting an employer's property from employees. For example, in *Metropol Security Limited*, *supra*, the persons in question provided security services during labour disputes. In *Corby Distilleries*

Limited, [1980] OLRB Rep. Feb. 194, they recorded all employee vehicles entering or leaving the plant and refused admission to anyone without a valid pass. Those found to be guards in *Imperial Tobacco Company Limited*, [1969] OLRB Rep. Feb. 1168 monitored employees to ensure that anyone leaving the premises with large parcels had the approval of the plant maintenance superintendent; a notice advising the workforce of this requirement was posted at the employer's entrance where the guard was stationed.

9. These cases may be contrasted with *Geo. A. Crane & Sons Limited, supra*. In that case, the hours worked by watchmen at construction sites did not coincide, for the most part, with the hours of work of the rest of the workforce. As their role in monitoring employees was negligible, the Board concluded they were not guards within the meaning of the Act.

10. Turning to the facts at hand, we conclude the nine employees in dispute are not guards. Some of the duties they perform have nothing to do with the protection of property – driving the ambulance and answering the telephone. To the extent that they are engaged in the protection of property, their almost exclusive concerns are visitors and intruders, not employees of either Moose Factory Hospital or Ralson Construction.

11. The respondent also contended that two individuals exercise managerial functions within the meaning of section 1(3)(b) of the Act. Roy McLeod, the superintendent from maintenance, and William Corston, the supervisor of security services, were examined by the Board Officer. At the hearing, the applicant conceded that Roy McLeod ought to be excluded from the bargaining unit.

12. William Corston supervises eight people engaged in the provision of security services at the Moose Factory hospital. Like those he supervises, Corston works days, afternoons and nights on rotation. He reports directly to Mike Venasse who is stationed in North Bay. Corston prepares shift schedules and approves annual vacations on a first come first serve basis. When a scheduled employee is unable to work, Corston either calls in a spare or assigns overtime to a regular employee. He cannot grant time off for medical or dental appointments without first obtaining approval from Mike Venasse. As no one has been hired or laid off to date, Corston's role in these circumstances is unclear. According to William Corston, if he saw someone reporting to work late, he would speak to that person. However, a written warning to an employee whose job performance is deficient can be issued only upon the instructions of Mike Venasse; there has been one such incident. Although there is no formal system of job evaluation, Corston was recently asked to report to Mike Venasse about a problem employee. An employee with a question about his pay cheque speaks to the bookkeeper, not to Corston. William Corston keeps log books on a number of subjects – employee work hours, security rounds, temperatures, ambulance trips, etc. Although he attends administrative meetings at the hospital, he testified that hospital personnel would not raise with him deficiencies in the performance of the employees he supervises. He orders supplies, such as stationery and batteries, from the hospital; occasionally an order is not filled because too many supplies are requested. Corston is paid more than other employees but receives the same fringe benefits.

13. As the Board observed in *McIntyre Porcupine Mines Limited*, [1975] OLRB Rep. Apr. 261, a supervisor who relays information to management and co-ordinates the work of employees, but does not exercise “effective control or authority” over them, is not a manager. Applying this test to the facts at hand, we find that William Corston does not at present exercise managerial functions within the meaning of section 1(3)(b) of the Act.

14. The Board is satisfied that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made were members of the applicant on September 30, 1983, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the Act.

15. A certificate will issue to the applicant.

1591-83-U;1593-83-U International Union of Operating Engineers, Local 793, Complainant, v. **Noranda Mines Limited** and Noranda Exploration Company Limited, Canadian Mine Services Limited, Cameron McMynn Contracting Limited, Canadian Mine Enterprises Limited, Respondents, v. Labourers International Union of North America Ontario Provincial District Council, Labourers International Union of North America, Local 607, United Brotherhood of Carpenters and Joiners of America, Local 1669, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 508, International Association of Bridge, Structural and Ornamental Ironworkers, Local 759 and United Steelworkers of America, Interveners; United Brotherhood of Carpenters and Joiners of America, Local 1669, and International Association of Bridge, Structural and Ornamental Ironworkers, Local 759, Complainants, v. Cameron McMynn Contracting Limited, Canadian Mine Enterprises Limited, Canadian Mine Services Limited and Noranda Mines Limited and Noranda Exploration Company Limited, Respondents, v. Labourers International Union of North America Ontario Provincial District Council, Labourers International Union of North America, Local 607, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 508, and United Steelworkers of America, Interveners

Right of Access – Unfair Labour Practice – Violation of consent access order alleged – Board clarifying period of time order in effect [*This decision was inadvertently omitted from the November, 1983 issue: Editor*]

BEFORE: M. G. Mitchnick, Vice-Chairman, and Board Members W. H. Wightman and P. J. O’Keeffe.

APPEARANCES: *S. B. D. Wahl for Operating Engineers and Labourers; John Keenan, L. Highcock, A. M. Turnbull and J. Snow for Noranda Mines; R. J. Drmaj for Canadian Mines and Cameron McMynn; Harold F. Caley, Jack Pesheau and Bill Sherman for Carpenters; Michael A. Church, Larry Baille and Robert Stoppell for Ironworkers; Alex J. Ahee and Marcel Jolie for U.A. Local 508; Alex J. Ahee for Boilermakers’ Lodge 128; Brian Shell for Steelworkers; Raimo T. Heikkila for Bluebird Construction.*

DECISION OF THE BOARD; November 25, 1983

1. These are consolidated matters filed under sections 89, 93 and 135 of the *Labour Relations Act*. The matter complained of was essentially the alleged violation of a consent access order issued by the Board in Board File Nos. 1085-83-M, 1100-83-M and 1306-83-M, and the parties, with the exception of the United Steelworkers of America, were content to have the Board deal with it on that basis. On the agreement of the parties, the Board made it clear that no access order had been made, or was in issue, with respect to Bluebird Construction or Kilborn Limited. It is noted that the Boilermakers, Lodge 128, although appearing through counsel, were not parties to the original access order.

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2. For reasons given orally at the hearing, the Board found that it was unnecessary in the case before it to establish general rules for the life span of an access order described without temporal limitation, or deal in that regard with the relationship between sections 11 and 79 of the Act. Particularly in light of the competing application for certification filed by the United Steelworkers of America, and the presence of that union on the jobsite as a result of their challenged collective agreement, the Board found a *bona fide* justification to exist for the complainant building trade unions' assertion that they continued to require access to the property in the terms agreed upon for the purpose of attempting to persuade the employees to join their union. The Board therefore declined to read into the access order a term which would have declared the order to be "spent" by the time of the hearing.

3. The Board accordingly made it clear that the consent access order continued in effect for each union named therein to the point of the hearing, and until a vote is held or the competition for members under their respective application for certification is otherwise determined. The Board also noted that the access order unquestionably continued in effect for any trade union named in the order who had not yet filed their application for certification, and for whom no "terminal date" had therefore been reached.

2444-83-U Jeanette Kirkpatrick, Complainant, v. The Canadian Union of Public Employees, Local 1329, Canadian Union of Public Employees, Grace Hartman, Gordon J. Allan, Paul Gilbert, and John Vlahovic, Respondents, v. **The Corporation of the Town of Oakville**, Employer

Duty of Fair Representation – Practice and Procedure – Remedies – Unfair Labour Practice – Complainant and union agreeing that representation duty breached – Direction requested including arbitration of grievance and extension of time limits in collective agreement – Employer’s challenge to Board’s jurisdiction to extend time limits rejected – Employer entitled to require proof of case as it affects employer

BEFORE: Owen V. Gray, Vice-Chairman.

APPEARANCES: *Crawford N. McNair and Jeanette Kirkpatrick for the complainant; Naomi Duguid for the respondents Local 1329, Paul Gilbert and John Vlahovic; S. R. Hennessy for the respondents CUPE (the National), Jeff Rose and Gordon J. Allan; D. K. Laidlaw, Q.C., E. Stewart, Arthur Bishop and Lois Payne for the employer.*

DECISION OF THE BOARD; April 13, 1984

1. This complaint filed under section 89 of the *Labour Relations Act* alleges violation by the respondents of section 68 of that Act. The complaint came on for hearing April 9, 1984, at which time I delivered an oral ruling with respect to certain preliminary issues. The text of that ruling is set out here together, where necessary, with supplementary reasons.

2. The factual background was set out in my oral ruling:

In this complaint, Jeanette Kirkpatrick alleges she has been dealt with by the respondent Local and National unions, and various of their officials and members, contrary to section 68 of the Act. The complainant says the trade union respondents acted in a manner which was arbitrary, discriminatory or in bad faith in their handling of her grievance of what for these purposes may be described as the termination of her employment by her employer, The Corporation of the Town of Oakville (“the Town”). That grievance, she says, should have been but was not processed through to arbitration. Instead, the Town was told the grievance would not be pursued. The complainant now asks for remedies which include an order that she be reinstated in her employment. Because of the nature of the remedies sought, she has named the Town as a person who may be affected.

The “termination” complained of occurred in May, 1983. The decision not to proceed with the grievance was communicated to the Town in July, 1983. The complaint was filed in late January, 1984 and served on the Town in early February. The Town filed a reply April 5, 1984. Paragraphs 9 and 10 of that Reply read as follows:

9. On June 17, 1983, the Town Administrator denied the Complainant's grievance.

10. The Complainant took no further steps to request that the grievance proceed further to arbitration in accordance with the Collective Agreement, and the time limits prescribed for so doing have expired. At no time prior to the bringing of this Complaint has the complainant or any person acting on her behalf requested the Town of Oakville to extend the time limits for arbitration as prescribed by the Collective Agreement.

In the meantime, the complainant and the trade union respondents have made a peace, by which the Local trade union agrees to take Mrs. Kirkpatrick's grievance to arbitration. The Town has now been asked to extend the time limits referred to in its reply. The Town has refused that request.

The trade union respondents admit that the respondent Local has breached section 68 and ask that the Board make orders:

- (a) requiring the Local to proceed to arbitration with Mrs. Kirkpatrick's grievance;
- (b) waiving the procedural and timeliness requirements of the collective agreement in order to enable the grievance to proceed to arbitration on the merits; and
- (c) ordering the Local to pay, in the event the arbitrator awards back-pay and benefits, the amount which is attributable to the failure to proceed to arbitration.

The complainant and the trade union respondents say that their agreement to these orders is a sufficient basis for granting them. The Town takes the position that:

- (1) the Board should not send the complainant's grievance off to an arbitration in which the Town will be required to participate, without being satisfied that arbitration is appropriate having regard to all the circumstances, including the low probability that an arbitrator would exercise any jurisdiction he or she has to extend collective agreement time limits; and
- (2) that in any event the Board has no jurisdiction to direct the Town (or, presumably, any party to a collective agreement) to waive time limits specified by a collective agreement.

This Board has for many years interpreted section 89 of the *Labour Relations Act*, and the predecessors of that section, as affording it the

jurisdiction to remedy a violation of section 68 by directing that a grievance be taken to arbitration and that procedural impediments in the applicable collective agreement, such as time limits, be waived by the parties – including the employer; it was and is for this reason that employers are regarded as proper parties to a section 68 complaint: in this regard see *Gebbie and Longmore*, [1973] OLRB Rep. Oct. 519; *Imperial Tobacco Products*, [1974] OLRB Rep. July 418, reconsideration denied at [1974] OLRB Rep. Sept. 609; *Leonard Murphy*, [1977] OLRB Rep. Mar. 146; *Massey Ferguson Limited*, [1977] OLRB Rep. Apr. 216; *Reginald Walker*, [1980] OLRB Rep. Oct. 1651; *Bedard Girard Ontario*, [1981] OLRB Rep. Oct. 1338; *North York General Hospital*, [1982] OLRB Rep. Aug. 1190; and, *Savage Shoes Ltd.*, [1983] OLRB Rep. Dec. 2067. Counsel for the Town concedes that the Board would derive such jurisdiction from the words “notwithstanding the provisions of any collective agreement” in section 89(4), were it not for the provisions of section 44(6) which, counsel argues, delegates any question of time limits exclusively to an arbitrator.

3. The effect on an employer of an employee’s complaint that his bargaining agent has violated section 68 [then section 60] of the *Labour Relations Act*, was first addressed in the *Gebbie and Longmore* decision, *supra*, in which the Board had this to say:

49. In view of the disposition of this case it is not necessary for us to finally decide the issue. However, because of the preliminary argument and discussion that ensued during the course of the proceedings, we feel that some comments are necessary. We recognize that section 60 imposes no statutory duty on an employer, but, we also recognize as we indicated in our interim decision that section 79(4)(c) gives this Board broad remedial powers including the vacating of the provisions of a collective agreement. If the Board is to utilize the remedy of remitting matters to arbitration it will undoubtedly be faced with the criticism that an employer whose rights may be affected is not a party to the proceedings; this is particularly so should the Board require time limits in a collective agreement to yield which may be permissible under section 79(4)(c). In order to avoid a denial of natural justice in these circumstances an employer should be a party to the proceedings and the Board’s Rules of Procedure, i.e., Rules 28 and 54, may be used to give an employer notice and the opportunity to appear in those proceedings where his rights may be affected.

50. The real issue is whether the enforcement provisions of the Act contained in section 79(4)(c) should be made to run against an employer in the absence of any statutory violation by that employer. We recognize that in many situations appropriate relief cannot be afforded to an employee unless the relief can run to an employer. Section 79(4)(c) if read literally suggests that there may be relief against both the union and the employer where there is a breach of section 60.

51. Counsel for Ford took the position that the reference to section 60 was inserted in section 79(4)(c) in order to enable the Board to grant a remedy against a union for breach of section 60, but it did not contemplate that a remedy would also be awarded against an employer. That is the issue that remains to be decided. We point out that in *Vaca v. Sipes* the Court had the opportunity to discuss the relationship of an employer to the situation where the union had violated its statutory duty. In *Vaca v. Sipes* the Court stated at p. 18,302:

“Though the union has violated a statutory duty in failing to press the grievance, it is the employer’s unrelated breach of contract which triggered the controversy and which caused this portion of the employee’s damages. The employee should have no difficulty recovering these damages from the employer, who cannot, as we have explained, hide behind the union’s wrongful failure to act; *in fact, the employer may be (and probably should be) joined as a defendant in the fair representation suit, ...*”

(italics added)

The conclusion in *Vaca v. Sipes* was that the remedy should run to the employer notwithstanding that it was the union that had violated its statutory duty.

52. Since we did not call on the respondent employer and the respondent union for final argument in this case, we do not think it appropriate to finally decide the issues raised. We do wish, however, to record the raising of the argument and our concern with respect to the operation of section 60 and section 79(4)(c), and to leave the matter in abeyance for argument and final decision at another time.

The passage just quoted was reviewed by the Board in *Imperial Tobacco Products, supra*, and summarized in the following terms:

In other words, the references to section 60 in section 79 have to be viewed in relation to the legislation history of section 60. A trade union’s duty of fair representation originated with the courts of the United States (see *Steele v. Louisville & Nashville Railroad Co. et al* (1944) 323 U.S. 192; *Ford Motor v. Huffman et al* (1953) 345 U.S. 330; *Humphrey et al v. Moore et al* (1964) 375 U.S. 335; *Vaca et al v. Sipes, Administrator* (1967) 386 U.S. 171) and only later was the duty adopted by the National Labour Relations Board by way of adjudication (*Miranda Fuel Co. NLRB* 1962, 51 LRRM 1584) and by the Ontario Labour Relations Board by way of legislation (*An Act to amend The Labour Relations Act* S.O. 1970, c. 85, ss. 23 and 28). In this context the excerpt from *Vaca and Sipes* (*supra*) reproduced in *Gebbie* (*supra*) and a similar sentiment expressed by Mr. Justice Goldberg in *Humphrey v. Moore* (*supra* at p. 356-357) become very important in placing a meaning upon the variety of wording found in section 79(4)(c). The legislative draftsmen was working with

this background to the duty of fair representation and for this reason the Board prefers to give sections 79(1)(c) and 79(4)(c) a wide and liberal interpretation in order to insure that the Board's remedial powers remain meaningful and effective. Moreover, this reasoning, while based upon *Vaca v. Sipes* (supra) carries significance for persons and employees as well as employers. If a complaint makes out a *prima facie* justification for the joining of such individuals in order that the Board provide an effective remedy for the violation of a section 60 right, the Board will join such individuals.

In *Leonard Murphy*, supra, the Board found that the respondent trade union had violated what was then section 60 of the Act by refusing to process the complainant's grievance. The Board's decision in that case is illustrative of the reasoning which can lead to a remedial order of the sort to which the respondent trade unions consent in this case:

33. We must now determine what remedy will most appropriately cure the damage occasioned by the union's violation of the Act.

34. Section 79(4) of the Act gives the Board broad remedial authority and reads in part as follows:

79(4) ... and where the Board is satisfied that an employer, employers' organization, trade union, council of trade unions, person or employee has acted contrary to this Act it shall determine what, if anything, the employer, employers' organization, trade union, council of trade unions, person or employee shall do or refrain from doing with respect thereto and such determination, without limiting the generality of the foregoing may include, notwithstanding the provisions of any collective agreement, any one or more of,

- (a) an order directing the employer, employers' organization, trade union, council of trade unions, employee or other person to cease doing the act or acts complained of;
- (b) an order directing the employer, employers' organization, trade union, council of trade unions, employee or other person to rectify the act or acts complained of; or
- (c) an order to reinstate in employment or hire the person or employee concerned, with or without compensation, or to compensate in lieu of hiring or reinstatement for loss of earnings or other employment benefits in an amount that may be assessed by the Board against the employer, employers' organization, trade union, council of trade unions, employee or other person jointly or severally.

Without limiting the scope of possible orders the Act specifically endorses orders to cease doing the act(s) complained of, to rectify the act(s) complained of and to reinstate and/or compensate. That the section states

that such orders may be made "notwithstanding the provisions of any collective agreement" implies that an order may override the terms of the collective agreement and thereby affect parties other than the specific offender. The breadth and flexibility of the remedial powers given the Board under section 79 enable the Board to respond directly to a specific violation of the Act and to as nearly as possible put the parties into the position they would have been in if the violation of the Act had not occurred.

35. In this case the arbitrary and bad faith conduct of the Union Committee denied the grievors their chance to have their grievances heard on the merits in arbitration. What remedy will most appropriately rectify this loss?

36. An isolated order for damages against the union would not be an appropriate remedy in the circumstances of this case; it is only in the event that the grievances are ultimately successful at arbitration the grievors will have suffered financially from the union's violation of section 60. If the grievors were properly discharged, the union's mismanagement will not have prejudiced the grievors beyond delaying the ultimate resolution of their rights.

37. Since the Board found that the violation of section 60 stemmed from the failure of the Union Committee to direct its mind to the merits of the grievances the Board might direct the union to reconstitute a Union Committee and reprocess the grievances under the terms of section 9 of the collective agreement. On reconsideration the decision might be made either to affirm the company's decision to discharge, to settle the grievances or to submit them to arbitration. The evidence indicates to the Board, however, that the positions of both the union and the company have been solidified over the six month period in question to make any resolution short of arbitration most unlikely. The company has repeatedly indicated that it does not intend to re-evaluate or modify its decision to discharge the two grievors. As well, the general membership of the union voted both on October 7, 1976 and January 6, 1977 to submit the matter to arbitration and has already appointed Mr. R. Sievers as its nominee. It is the opinion of this Board that a direction to the union to reprocess the grievances from the stage of establishing the Union committee would occasion the repetition of considerations which have already been made by the union in good faith and in a non-arbitrary manner and would not have the effect of persuading either the company or the union to a position of compromise. The prejudice occasioned by further delays involved in remitting the grievances into the ordinary stream of the grievance procedure would not, in these circumstances, be counter-balanced by the prospect of a settlement short of arbitration.

38. Accordingly, the Board finds that a direction to the parties to arbitrate forthwith the grievances will most effectively remedy the violation of the Act. This order is made notwithstanding either the possibility that the

Union committee may not yet have fulfilled its section 9 duty under the collective agreement or the possibility that the Union Committee has already in fact confirmed the employer's decision to discharge the grievors. The order therefore overrides the collective agreement in that (1) it dispenses with the requirement of the parties to proceed through the Union Committee stage as set out in section 9 of the collective agreement in order to advance to arbitration and (2) it nullifies the effect that section 9 might have in preventing a grievance from proceeding to arbitration if it be found that the Union Committee has properly confirmed the company's decision to discharge the grievors.

39. In the event that the grievances are successful at arbitration, the Board orders that the union pay the compensation covering the period of time occasioned by the union's violation of section 60. The Board takes the view that the union's violation of section 60 began on September 3, 1976 with the meeting between the company, the Union Committee and Mr. Shaw, and that it is being remedied by this decision. Thus if the grievances of either Mr. Murphy or Mr. Shaw are successful the Board orders that the union bear the responsibility for their compensation from September 3, 1976 to the date of this decision.

As the Board's analysis in the *Walker* case indicates, a remedy which directs that an improperly abandoned or ignored grievance be processed to arbitration, despite any procedural impediment arising from the delay, best accomplishes the remedial object of restoring the complainant employee to the position he or she would have been in but for his bargaining agent's breach of section 68. In principle, the employer should be neither the victim nor the beneficiary of a trade union's breach of its duty to an employee. By assigning to the trade union responsibility for any monetary award referable to any delay caused by its breach, that most obvious source of prejudice to the employer is minimized. The financial prejudice to an employer of the delay in proceeding to arbitration is shifted to the party responsible for the delay. Other types of prejudice are conceivable, and there may be some types of prejudice whose consequences cannot be shifted to the party or parties responsible. That would be a relevant factor in assessing whether to make an order which compels arbitration on the merits, by analogy with the approach the Board has taken in cases dealing with the consequences of a complainant's delay in filing a complaint. With respect to the Board's treatment of delay, see *Decor Wood Specialties Limited*, [1974] OLRB Rep. Mar. 136; *CCH Canadian Limited*, [1977] OLRB Rep. June 351; *Concrete Construction Supplies*, [1979] OLRB Rep. Aug. 739; *Irving Posluns Sportswear*, [1979] OLRB Rep. Oct. 986; *Sonic Transport Systems Limited*, [1981] OLRB Rep. Oct. 1483; *Sheller-Globe of Canada Ltd.*, [1982] OLRB Rep. Jan. 113 (judicial review denied at 42 O.R. (2d) 73); *The Corporation of the City of Mississauga*, [1982] OLRB Rep. Mar. 420; *Concrete Construction Supplies*, [1982] OLRB Rep. Oct. 1446; *Chrysler Canada Ltd.*, [1983] OLRB Rep. Apr. 490; *Caravelle Foods*, [1983] OLRB Rep. June 875; and, *John T. Hepburn Limited*, [1984] OLRB Rep. Jan. 39. In any event, when the Board exercises its jurisdiction to require that a grievance be arbitrated on its merits "notwithstanding the provisions of any collective agreement", it does so in order to fashion the most suitable remedy for a violation of the *Labour Relations Act*.

4. The language of the then section 79(4) referred to in *Gebbie and Longmore* and *Imperial Tobacco Products* was recast in the 1975 amendments to the *Labour Relations Act*

(i.e. S.O. 1975, c.76, s.20(1)) so as to read as indicated in the above-quoted passage from the *Walker* case. That language has not been amended since 1975, and now appears as section 89(4) of the current Act. The 1975 amendments generally expanded the Board's remedial jurisdiction (see *Re Tandy Electronics and United Steelworkers of America*, (1981) 30 O.R. (2d) 29 (Div. Ct.) per Cory, J. at p. 46-47). It has never been suggested that those particular amendments precluded the remedial authority described in *Gebbie and Longmore* and *Imperial Tobacco Products*.

5. Counsel for the Town concedes that the language of section 89(4), and particularly the words "notwithstanding the provisions of any collective agreement", are broad enough to give the Board jurisdiction to override the provisions of a collective agreement in remedying an unfair labour practice, and would give the Board jurisdiction to make an order in the form sought by the union here, directing a waiver of timeliness requirements of the collective agreement, were it not for section 44(6) of the Act. He argues that that section assigns jurisdiction over time limits exclusively to an arbitrator or arbitration board. Section 44(6) of the Act reads as follows:

Except where a collective agreement states that this subsection does not apply, an arbitrator or arbitration board may extend the time for the taking of any step in the grievance procedure under a collective agreement, notwithstanding the expiration of such time, where the arbitrator or arbitration board is satisfied that there are reasonable grounds for the extension and that the opposite party will not be substantially prejudiced by the extension.

Counsel for the Town argues that the words "notwithstanding the provisions of any collective agreement" in section 89(4) do not permit the Board to fashion a remedy "notwithstanding a provision of the *Labour Relations Act*", which is what he says the Board would be doing if it did what section 44(6) permits an arbitrator to do. Counsel for the trade union respondents notes that the jurisdiction granted to arbitrators by section 44(6) can be eliminated by express language in a collective agreement. It follows from the Town's argument, she says, that the Board would still have the jurisdiction it has long exercised in section 68 cases where the relevant collective agreement expressly provides that subsection 44(6) shall not apply. This is, she suggests, a peculiar result. She argues that section 44(6) only prescribes that which will be read into a collective agreement in the absence of a contrary provision and, therefore, is analytically in no higher position than a collective agreement provision.

6. As counsel for the Town observed, subsection 44(6) effectively overrules the result in *Regina v. Weiler et al, ex parte Union Carbide Canada Limited*, (1968) 70 D.L.R. (2d) 333, 68 CLLC ¶14,137 (S.C.C.), which held that arbitrators have no power to relieve against failure to comply with contractual time limits unless the agreement expressly grants them that jurisdiction. Professor Palmer has described the state of the law before the enactment of subsection 44(6) in the following way:

The presence of time limits in the collective agreement and the failure of one or both of the parties to adhere to these limits in processing a grievance has given rise to many problems for labour arbitration boards. These problems have been dealt with in many diverse and often novel ways. For example, many awards have been based upon the distinction

between a “mandatory” or “directory” time limit clause. In most cases, this distinction is one without a difference and, as such, has played havoc with the arbitration process and industrial relations in general.

(Palmer, *Collective Agreement Arbitration in Canada*, 2nd ed., 1983 (Butterworths) at p. 188)

7. Arbitrators are concerned with the settlement by arbitration of differences between the parties to a collective agreement concerning its interpretation, application, administration or alleged violation. Subsection (6) and other subsections of section 44 address the powers of the arbitrator, procedural and remedial, in adjudicating those differences. Differences potentially arbitrable under a collective agreement can also form the proper subject matter of an unfair labour practice complaint over which this Board will have jurisdiction despite any concurrent arbitral jurisdiction. The Board approaches such matters from a potentially different perspective and with a broader remedial repertoire: see *Valdi Inc.*, [1980] OLRB Rep. Aug. 1254. Where there is a congruence of the complaint’s subject matter and an arbitrable issue, Board deference to arbitration on that issue, if it occurs, presupposes that the arbitration process will be procedurally and remedially effective in settling the issue: *Imperial Tobacco Products, supra*; *Valdi Inc., supra*. The possibility that an arbitrator could reinstate a discharged employee does not preclude the Board’s jurisdiction under section 89(4) to reinstate if the discharge constitutes an unfair labour practice. Similarly, the assignment to an arbitrator of jurisdiction to relieve against a failure to abide by contractual time limits as part of the arbitration process is not inconsistent with the Board’s having remedial jurisdiction sufficiently broad for it to do the same in response to and in the course of resolving an unfair labour practice complaint. The simple answer to the argument of counsel for the Town is that section 44(6) does not expressly describe the power thereby conferred on arbitrators as “exclusive”. Significantly, subsection 44(6) [then 37(5a)] was added to the Act by section 10 of S.O. 1975, c.76, the same legislation by which this Board’s remedial authority was enlarged and re-described. Had the Legislature intended to carve the subject matter of subsection 44(6) out from the balance of the Board’s remedial jurisdiction, it could and, in my opinion, would have used explicit language. As it did not, I am satisfied the Board has the jurisdiction counsel concedes it would have had but for section 44(6).

8. In my oral ruling of April 9th, I said:

For reasons to be delivered at a later date, I am satisfied that in fashioning remedies for violations of the Act, the Board does have jurisdiction in appropriate circumstances to order that time limits be waived by the parties to a collective agreement.

For the reasons now set out in this decision, that ruling is hereby confirmed. The oral ruling went on to provide:

Before any remedy can be granted, however, a violation must be established. If a remedy sought affects the employer, as the remedy sought does here, the employer is entitled to a hearing with respect to any issues relating to the granting of such a remedy, including issues as to the existence of a breach of the Act and as to circumstances which might lead the Board to grant any particular, or any, remedy for the violation. In

this regard, delay in filing the complaint and the reasons for the delay can have an important effect on remedy.

The Town is a respondent in a real sense, and will be so treated in these proceedings. It is entitled to a hearing on any issue which materially affects it. The issue of remedy is such an issue. That issue does not arise until a breach of the Act has been established.

In short, the Board cannot dispose of this complaint in the manner asked by the complainant and trade union respondents without hearing evidence and determining that the evidence warrants the relief sought. In essence, the Town puts the complainant to the proof of her case insofar as it may affect the Town. That is what the complainant must do.

2722-83-U Chester Pacan, Complainant, v. Teamsters Union Local 879, and Ryder Truck Lines, Respondents

Constitutional Law – U.S. and Ontario based companies interdependent and operationally connected – Engaged in hauling trailers between U.S. and Canada – Fact that employees of Ontario company never cross boundary not precluding federal jurisdiction

BEFORE: Owen V. Gray, Vice-Chairman.

APPEARANCES: *Chester Pacan on his own behalf; Eric del Junco and D. McIlravey for the respondent union; Roger C. Ransom for the respondent company.*

DECISION OF THE BOARD; April 2, 1984

1. The complainant alleges that he has been dealt with by the respondent trade union contrary to the provisions of section 68 of the *Labour Relations Act*. The complaint relates to grievances allegedly filed by the complainant while employed by the respondent employer. The respondent trade union challenges this Board's jurisdiction to hear the complaint. It says the labour relations of employees it represents in dealings with the respondent employer fall within federal jurisdiction. The facts relevant to jurisdiction are not in dispute.

2. The company known to the complainant as Ryder Truck Lines is federally incorporated, and recently changed its name from Ryder Truck Lines Limited to Ryder/P.I.E. Nationwide Limited. It will be referred to in this decision as "Ryder Canada". Ryder Canada is operated "as a division of" a U.S. company called Ryder/P.I.E. Nationwide Inc., which will be referred to here as "Ryder U.S.". Ryder Canada and Ryder U.S. are under common ownership and engage in the highway transport business. Ninety per cent of the loads carried by Ryder Canada are destined for or originate from points in the U.S. Trailers containing goods destined for the U.S. are hauled by Ryder Canada tractors to a yard in Fort Erie. There the trailers are attached to tractors operated by Ryder U.S., which then haul the trailers to their U.S. destinations. The same process operates in reverse when goods originating in the U.S.

are destined for Canada. A customer of either Ryder company need only deal with that company concerning the international shipment of goods. Loads carried by the Ryder companies are carried on one through bill, regardless of origin or destination. A shipment is initiated with one set of paper work. Although the U.S. and Canadian legs of an international movement are each separately dispatched, the dispatching is co-ordinated by the Ryder organization. Drivers represented by the respondent trade union do not cross international boundaries, nor do the tractors they drive. Ryder U.S. drivers take their tractors no further than the "free zone" compound at Fort Erie.

3. The facts recited emerge from the statements of the complainant and representatives of the respondents. After hearing those representations, the complainant agreed that the facts were as they had been described. He said he had not been aware that there was an issue of this kind, even though he had consulted a labour lawyer. He had no argument to make about jurisdiction, and essentially left it to the Board to determine the issue.

4. International and inter-provincial highway transport undertakings, and their labour relations, fall within federal jurisdiction in the scheme of division of powers provided by sections 91 and 92 of the *Constitution Act, 1867 to 1981*: *A. G. Ont. et al vs. Winner, Winner et al vs. S.M.T. (Eastern) Ltd.*, [1953] A.C. 541; *Re Tank Truck Transport Limited*, [1961] 25 D.L.R. (2d) 161 (Ont. H.C.), aff'd [1963] 36 D.L.R. (2d) 636 (Ont. C.A.); *Regina vs. Cooksville Magistrate's Court, ex parte Liquid Cargo Lines Ltd.* [1965] 46 D.L.R. (2d) 700 (Ont. H.C.). The fact that tractors and employees of Ryder Canada may always remain in Ontario does not preclude the labour relations of that company from falling within federal jurisdiction. Ryder Canada hauls trailers which have crossed or are about to cross international boundaries. It does so as a functionally integrated part of the "Ryder" undertaking, of which Ryder Canada and Ryder U.S. are interdependent and operationally connected components. If that undertaking were conducted by one corporation, there would be no question that its labour relations with employees in Canada would be governed by federal legislation. The fact that there are two distinct corporations involved in the undertaking does not lead to a different result. In *Northern Telecom Limited vs. Communications Workers of Canada et al*, [1980] 1 S.C.R. 115, Mr. Justice Dickson noted at pages 134-135 that:

In the field of transportation and communication, it is evident that the niceties of corporate organization are not determinative. As McNairn observes in his article ["Transportation, Communication and the Constitution: The Scope of Federal Jurisdiction" (1969), 47 Can. Bar Rev. 355] at pp. 380-1:

A transportation or communication undertaking is a possible corporate activity but it may or may not be segregated from the total corporate enterprise or it may even be larger in scope than a single corporate enterprise. To determine questions of this nature corporate objects have a certain relevance. But of primary concern is the integration of the various corporate activities in practice (including the corporate organizations themselves if more than one is involved) and their inherent interdependence.

McNairn's comment is borne out by the cases. On the one hand, a single enterprise may entail more than one undertaking, e.g. Canadian Pacific

Railway's Empress Hotel was found to be an undertaking separate and independent from the railway undertaking in *Canadian Pacific Railway Co. v. Attorney-General for British Columbia* [[1950] A.C. 122]. On the other hand, two separate corporate enterprises may be found to be included within one single and indivisible undertaking, as in stevedores employed by a stevedoring company loading and unloading ships in the *Stevedoring* case [[1955] S.C.R. 529, sub nonn. *In re the validity of the Industrial Relations and Disputes and Investigations Act*], or a trucking company which did 90 per cent of its business for the Post Office in *Letter Carriers' Union of Canada v. Canadian Union of Postal Workers* [[1975] 1 S.C.R. 178].

(See also *Northern Telecom Canada Ltd. et al v. Communications Workers of Canada et al* (No. 2), (1983) 48 N.R. 161, 83 CLLC ¶14,048 (S.C.C.))

5. On the basis of the facts as described to me and agreed to by the complainant, I ruled orally that this Board is without jurisdiction to entertain this complaint, because the undertaking of the respondent employer falls within federal jurisdiction. That ruling is hereby confirmed. Jurisdiction over the subject matter of this complaint lies, if at all, with the Canada Labour Relations Board under section 136.1 of the *Canada Labour Code*.

6. This complaint is, accordingly, dismissed.

2998-83-R Canadian Union of Operating Engineers and General Workers, Applicant,
v. The Sisters of St. Joseph of the Diocese of London in Ontario Operating **St. Joseph's Hospital at Sarnia**, Ontario, Respondent

Certification – Practice and Procedure – First application dismissed restricted to maintenance employees – Second application for all support employees including maintenance dismissed – No bar imposed on dismissal of third application for similar all support employee unit

BEFORE: Kevin M. Burkett, Alternate Chairman and Board Members F. W. Murray and C. A. Ballentine.

DECISION OF THE BOARD; April 24, 1984

1. This is an application for certification in which the applicant seeks leave of the Board to withdraw the application. The respondent, citing two previous unsuccessful applications, asks the Board to dismiss the application and impose a bar upon the filing of a subsequent application for a period of one year. The applicant, in support of its position that a bar not be imposed, points out that the first unsuccessful application was in respect of a nine (9) man maintenance unit that the Board found not to be appropriate for purposes of collective bargaining. The instant application, and the one immediately before it, are in respect of all support employees. The Form 9 filed by the union and the lists of employees filed by the respondent indicated that there are approximately 160 employees in this bargaining unit.

2. In the *Patchoque Plymouth Hawkesbury Mills* case [1972] OLRB Rep. July 747 the Board briefly set out in paragraph 7 those types of situations which have led the Board to exercise its discretion under section 103(2)(j) and impose a bar for a specific period of time on subsequent certification applications. The third type of situation referred to in the *Patchoque* case *supra*, is analogous to the case at hand and pertains to those instances where the Board is asked to exercise its discretion following the dismissal of a series of applications over a short period of time which cover essentially the same employees. In this regard the *Patchoque* case *supra* refers to the *J. W. Crooks Company* case [1972] OLRB Rep. Feb. 126 wherein the Board imposed a six month bar following the dismissal of an application which was the fourth unsuccessful application brought within a period of little more than three months. In the *Ken Bunyak's Bus Lines* case, Board File No. 5714-74-R, the Board found that a second unsuccessful application within a short period of time did *not* warrant the imposition of a bar to a third application. Although each case must be decided on its particular merits, these cases establish parameters which in the absence of special circumstances are persuasive.

3. The first application, as we have noted, was in respect of nine maintenance employees. Although these nine employees fall within the much larger all-employee unit (approximately 160 employees) for which the union has sought bargaining rights in this and the previous application, it can hardly be said that the first application pertains to the same employee group as would cause the degree of unrest and uncertainty necessary to support the imposition of a bar to a subsequent application.

4. Having regard to the foregoing we hereby dismiss the application but we do not impose a bar to the filing of a subsequent application.

**1898-83-M Labourers' International Union of North America, Local 1059, Applicant,
v. Sandercock Construction (1976) Ltd., Respondent**

Construction Industry Grievance – Parties to collective agreement incorporating by reference terms and conditions in other collective agreement – Employer's undertaking to adhere to those terms not making it bound by such other agreement – Only parties to original agreement can grieve violations of incorporated terms – Applicant not bound by agreement and no status to refer grievance under section 124

BEFORE: N. B. Satterfield, Vice-Chairman and Board Members F. W. Murray and L. Collins.

APPEARANCES: *Manuel Simoes, Dos Reis and David Strang for the applicant; D. L. Brisbin and R. S. Bettridge for the respondent.*

DECISION OF THE BOARD; April 17, 1984

1. The applicant has referred a grievance concerning the interpretation, application, administration or alleged violation of a collective agreement to the Board for final and binding arbitration pursuant to section 124 of the *Labour Relations Act*.

2. The referral was made November 14th, 1983 and was adjourned sine die on consent of the parties. It ultimately came on for hearing on March 13th, 1984. The referral raises the issue of whether the applicant, Labourers' International Union of North America, Local 1059 ("Local 1059") has jurisdiction to bring this grievance against the respondent, Sandercock Construction (1976) Ltd. ("Sandercock"). The issue is both a preliminary one and a substantive one. It is preliminary in terms of whether Local 1059 is bound to a collective agreement with Sandercock which would give the Board jurisdiction to hear and determine the grievance. If they are bound to a collective agreement, the substantive issue is whether Local 1059 is a proper party under the terms of the collective agreement to bring the grievance. There is a related issue of the timeliness of the grievance if the Board finds that Local 1059 has jurisdiction to bring it.

3. It is common ground between the parties that there is no signed collective agreement between Local 1059 and Sandercock. Sandercock admits to being bound to the labourers provincial agreement in the industrial, commercial and institutional sector of the construction industry in which it applies, but the issues between the parties do not involve that sector. It is Sandercock's uncontested evidence that the only collective agreement which it has signed with any local of the Labourers International Union of North America is one which it has with Local 1089 in Sarnia, Ontario ("the Agreement"). According to its terms, it is in effect from June 23, 1982 until January 31, 1985. That Agreement is the one on which Local 1059 relies in order to bring this grievance. Local 1059 contends that the terms of the Agreement bind Sandercock to another collective agreement which it refers to as the provincial civil engineering collective agreement ("the civil engineering agreement"). On the evidence, the civil engineering agreement is not a single collective agreement. There are several of them, identically worded except with respect to the name of the employer party. Each one is an agreement between the named employer and the Labourers' International Union of North America, Ontario Provincial District Council ("the Council") on behalf of its affiliated locals. Local

1059 and Local 1089 are affiliated locals of the Council. There are four such documents in evidence, each one signed by a different employer. Sandercock is not one of them. In the same way that Sandercock is not a party named to any of the individual civil engineering agreements with the Council, the Council is not a party named to the Agreement between Sandercock and Local 1089.

4. Local 1059 bases its claim that Sandercock is bound to the civil engineering agreement primarily on two provisions of the Agreement. These provisions are Article 2 – Recognition, clause 2.1 and Article 5 – Geographic Area, clause 5.3. These clauses provide as follows:

ARTICLE 2 – RECOGNITION

2.1 The employer recognizes [Local 1089] as the exclusive bargaining agent for all employees of the Employer in all sectors of the construction industry in the Province of Ontario engaged in work covered by the Schedules and classifications set out in this Agreement, and any additional classifications as may be agreed to by the parties, save and except non-working foremen and persons above that rank.

ARTICLE 5 – GEOGRAPHICAL AREA

5.1 This Agreement shall be effective within the County of Lambton.

5.2 Wages and conditions as outlined in this Agreement shall be effective within Labour Board Area 2 (County of Lambton) as defined by the Labour Relations Board.

5.3 If an Employer works *in other areas of the Province of Ontario, where there exists an agreement between a contractor or association of contractors and [Local 1089]*, the Employer agrees to abide by the wage rates and conditions of the said agreements.

(emphasis added)

It is also common ground between the parties that the agreement has no application to the industrial, commercial and institutional sector of the construction industry; the work Sandercock was performing in London which gave rise to this grievance was work in the sewer and watermain sector of the construction industry; and, the schedules referred to in clause 2.1 of the Agreement cover that work at least. That being the case, counsel for Local 1059 argues, clause 5.3 of the Agreement operates to incorporate into the Agreement the terms and conditions of the civil engineering agreement.

5. Article 2 – Recognition of the civil engineering agreement provides as follows:

ARTICLE 2 – RECOGNITION

2.01 The Employer recognizes the Union as the sole and exclusive bargaining agent for all employees engaged in construction work covered by

the classifications in this Agreement within the Province of Ontario, save and except non-working foremen and those above that rank, camp staff, office staff, those employees covered by a subsisting Collective Agreement and engineering staff for Civil Engineering Construction Work, which includes the Sewer and Watermain, Roadbuilding Heavy Construction Sectors, but excludes Tunnel Work, T.T.C. Rapid Transit System Construction and Utility Work as defined in the Collective Agreement between the Union and The Utility Contractors' Association of Ontario.

2.02 The work classifications specified in Schedule "C" attached hereto and hereby made part of this Agreement, are hereby recognized as being classifications within the jurisdiction of this Agreement. The parties agree to amend Schedule "C" in the event that both parties hereto agree that additional classifications should be included therein.

2.03 Each Local Union, as specified in Schedule "A", is the administrative party for this Agreement for work performed within the geographic area of such Local Union as defined in Schedule "A". *including the right to file grievances under Section 124 of the Ontario Labour Relations Act*, for alleged violations of this Agreement. Grievances dealing with the interpretation application and jurisdiction of this Agreement shall only be filed and processed by the Council itself.

(emphasis added)

Schedule "A" referred to in clause 2.03 makes Local 1059 the administrative party for the civil engineering agreement within the Counties of Middlesex, Huron, Bruce, Perth, Oxford and Elgin. They make up the Board's construction industry geographic area No. 3. The City of London where Sandercock was performing the work at issue herein obviously falls within Local 1059's administrative jurisdiction. Therefore, according to Local 1059's counsel, Local 1059 and not Local 1089 is the party having jurisdiction to refer a grievance against Sandercock under section 124 of the Act while Sandercock is performing sewer and watermain work within those three counties.

6. It is implicit in Local 1059's argument that it considers the Agreement to be provincial in its geographic scope as clause 2.1 purports to make it. Sandercock's counsel contends that it is in fact a province-wide collective agreement. Clause 2.1 standing alone certainly purports to make it that. Neither party, however, argued the effect of clauses 5.1 and 5.2 and, whatever their effect, they certainly introduce an ambiguity about the true geographic scope of the Agreement. It is unnecessary for the Board to decide whether the Agreement is provincial in scope, however, because, in order for Local 1059's argument to succeed the Board at least must find "... there exists an agreement between a contractor or association of contractors ..." and Local 1089 in the City of London where Sandercock was working. The civil engineering agreement on which Local 1059 is relying is not an agreement between Local 1089 and each employer who has signed it. It is an agreement between the Council made on behalf of Locals 1059 and 1089, amongst other affiliated locals of the Council and, while there is little doubt that it is binding upon Local 1089 with respect to each employer who has signed the agreement with the Council, the Board is satisfied that it is not binding on Local 1089 in the City of London.

7. It is clear from clause 2.03 of the civil engineering agreement that the Council is extending to its affiliated locals a limited administrative jurisdiction under the agreement. It makes each affiliated local "... the administrative party for [the civil engineering agreement] for work performed within the geographic area of such [affiliated local] as defined in Schedule 'A', including the right to file grievances under Section 124 of the Ontario Labour Relations Act, for alleged violations of [the civil engineering agreement]." But even with respect to grievances the Council reserves to itself the filing and processing of "...[grievances] dealing with the interpretation application and jurisdiction" of the civil engineering agreement. As the Board observed in paragraph 5 above, Schedule "A" gives to Local 1059 administrative jurisdiction for the six counties which comprise Board area #3. Similarly it gives administrative jurisdiction to Local 1089 in the County of Lambton. In turn, a separate appendix to the civil engineering agreement gives Local 1059 administrative jurisdiction in Elgin, Middlesex and Oxford counties over specific provisions with respect to hours of work, overtime, vacation pay, statutory holiday allowance, statutory holidays, travel and reporting pay and other working conditions, including union security. Another appendix gives Local 1089 administrative jurisdiction over specific provisions of a similar nature in the County of Lambton.

8. Having regard for Article 2, particularly clause 2.03 of the civil engineering agreement, its schedules and appendices referred to above and the overall construction of the document, the Board is satisfied that Local 1089 is not bound to the civil engineering agreement insofar as it applies to the city of London. Consequently, Local 1059 has no access to section 124 of the Act with respect to Sandercock for the work which gave rise to this grievance. Nor is there any evidence before the Board of any agreement between or binding upon Local 1089 and any other contractor or association of contractors which would have created for Sandercock any obligation under clause 5.3 of the Agreement with Local 1089 when Sandercock was performing the work in London which is at issue herein.

9. The result would be no different for Local 1059 even were the Board to interpret clause 2.3 of the Agreement between Sandercock and Local 1089 to create an obligation for Sandercock to apply the terms of the civil engineering agreement to the work which it was doing in London. In the Board's view, clause 5.3 of the Agreement would not operate to bind Sandercock to the civil engineering agreement. Sandercock has agreed to abide by "the wage rates and conditions" of whatever agreements apply. The term "abide by" according to Black's Law Dictionary (Fifth ed.), St. Paul, Minn.: West Publishing Co. (1979), means "To adhere to, to obey, to accept the consequences of". According to those meanings, therefore, Sandercock has agreed to adhere, to obey or accept the consequences of some other collective agreement, for example the civil engineering agreement. It is the Board's experience that, in the construction industry, it is not uncommon for a trade union and an employer or association of employers to describe in a collective agreement between them conditions such as the hours of work, wage rates, benefits and other working conditions by reference to a particular collective agreement between the same trade union and another employer or group of employers. In other words, the parties to a collective agreement incorporate into it by reference to another collective agreement certain of that other agreement's terms and conditions. That is done without the employer party to the collective agreement becoming bound to the reference agreement as though it were a party to it. Had it been the intent of the parties to the Agreement that Sandercock become bound to some other agreement between Local 1089 and "... a contractor or association of contractors ..." having effect outside of Lambton County as though Sandercock were bound thereto, the parties would have expressed that intent in clear language to that effect.

10. The terms and conditions of the reference agreement which are incorporated into the signed agreement between the parties become a part of the signed agreement. Therefore, if there is an issue between the parties as to what terms and conditions are incorporated or whether particular incorporated terms have application in a particular situation, it would be a matter for the parties to the signed agreement to sort that out in the grievance procedure or under section 124 of the Act. That being the case, if Sandercock should have applied terms and conditions of the civil engineering agreement when it was performing sewer and water-main work in London, Local 1089 as the trade union party to the Agreement would be the party to enforce those provisions. This is particularly so under section 124 of the Act because it provides that "Notwithstanding the grievance and arbitration provisions in the collective agreement ..., *a party to a collective agreement between an employer ... and a trade union ... may refer a grievance concerning the interpretation, application, administration or alleged violation of the agreement, ... to the Board for final and binding determination.*" (emphasis added).

11. Local 1059 is not a party to a collective agreement with Sandercock and in particular is not the trade union party to the Agreement. Therefore, it has no jurisdiction under section 124 to refer a grievance against Sandercock to the Board for final and binding determination.

12. On November 7th, 1983, one week before Local 1059 made this referral, the Board differently constituted, certified Local 1059, pursuant to section 144(3) of the Act, as exclusive bargaining agent for construction labourers employed by Sandercock in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin ("Board Area #3"), excluding the industrial, commercial and institutional sector of the construction industry. Sandercock's reply to the application for certification had included a reference to the Agreement with Local 1089, its term of operation and to Local 1089 being a party affected by paragraph 10 of the reply which requested from Sandercock:

The name and address of any trade union known to the respondent as claiming to be the bargaining agent of or to represent any employees who may be affected by the application:

In view of those circumstances Sandercock asked the Board during the hearing into this grievance referral to resolve which one of Local 1089 or Local 1059 holds bargaining rights for its construction labourers in Board area #3. The Board's record shows, however, that Sandercock did not cite the Agreement with Local 1089 as a bar to Local 1059's application for certification. This is clear from paragraph 7 of the Board's decision issuing the certificate to Local 1059 in which the matter of the appropriate bargaining unit was discussed in the following terms:

7. The respondent states that the appropriate bargaining unit is one described in terms of all construction labourers employed in the sewers and watermains sector of the construction industry. The respondent consents also to this application being disposed of ... by the Board without a hearing subject to the scope of the bargaining unit being limited to the sewers and watermains sector. It is the consistent policy of the Board to describe bargaining units in the construction industry without reference to sector except to the extent required by sub-sections 2 and 3 of section 144 of

the Act. Prior to those provisions being in the Act, it had been a long-standing policy of the board to describe construction industry bargaining units without reference to sectors, thus including all sectors. In this respect see *Lyle West Electric Limited*, [1978] OLRB Rep. Nov. 999; *Colonist Homes Ltd.*, [1980] OLRB Rep. Dec. 1729; and *Pelar Construction Ltd.*, [1981] OLRB Rep. Feb. 210. The respondent does not offer any grounds in its reply as to why the appropriate bargaining unit should be limited to the sewers and watermains sector, although it would appear that the project on which the respondent was engaged at the time of the application pertains to sewer [and] watermains. In view of the Board's policy with respect to appropriate bargaining units in the construction industry and absent any reference in the reply to a specific issue with respect to the appropriate unit which the respondent would be seeking to place before the Board if a hearing were held, there appears to be no useful purpose to list the application for hearing.

13. The certificate which the Board issued to Local 1059 with respect to Sandercock's construction labourers in the Counties of Oxford, Perth, Huron, Middlesex, Bruce, and Elgin is now a matter of record and law and it speaks for which trade union holds bargaining rights for Sandercock's construction labourers in the six counties and that is Local 1059. It was unnecessary for the Board in the instant case to decide whether the Agreement between Sandercock and Local 1089 establishes bargaining rights for Local 1089 for Sandercock's construction labourers in Board area #3. Therefore, if Sandercock believes that the decision of the Board with respect to the application for certification conflicts with bargaining rights held by Local 1089 for Sandercock's construction labourers arising out of the Agreement, it is open to Sandercock to request the Board to reconsider that decision.

14. For the reasons set out herein and the conclusion reached at paragraph 12 above, the Board is without jurisdiction to hear and decide the grievance referred to it in this application. Therefore the application is dismissed.

1649-83-U United Steelworkers of America, Complainant, v. Shaw-Almex Industries Limited, Respondent

Practice and Procedure – Witness – Subpoena *duces tecum* served on witness in bad faith bargaining hearing – Requiring production of records indicating wages and benefits paid to strike replacements – Request including information relating to managerial and office employees – Possibility of relevance sufficient – Implied undertaking not to use information for ulterior purpose safeguard enforceable by contempt proceedings – Board directing filing of documents with Registrar in advance of next scheduled hearing date

BEFORE: Owen V. Gray, Vice-Chairman, and Board Members J. D. Bell and W. F. Rutherford.

APPEARANCES: *C. M. Mitchell and N. Carriere for the complainant; James T. Heather, T. Churchmuck and L. Shaw for the respondent.*

DECISION OF THE BOARD; April 12, 1984

1. This is a complaint filed under section 89 of the *Labour Relations Act*. The complainant alleges violations of sections 3, 15, 64 and 66 of the Act. The major complaint is that the respondent has failed to bargain in good faith with respect to the renewal, with amendments, of the parties' last collective agreement, which expired January 31, 1983. The hearing of this complaint commenced November 22, 1983. At the conclusion of that day of hearing, the hearing was scheduled to continue January 10 and 12, 1984. On January 3, 1984, the Board released a decision confirming oral rulings made at the hearing of November 22, 1983 and disposing of evidentiary issues argued before and reserved by the Board on that day. The hearing continued, but was not completed, on January 10 and 12, 1984. The hearing was then scheduled to continue February 3, 1984. This decision deals with procedural matters which arose at the hearing of February 3, 1984.

I

2. The trade union's complaint was filed October 21, 1983 and elaborated in further particulars filed November 15, 1983. The complainant gave notice to bargain on January 5, 1983, and the parties first met January 27, 1983. The employer applied for the appointment of a conciliation officer on January 31, 1983. A second meeting between the parties took place March 22, 1983. A "no board" report was issued April 5, 1983, followed by the appointment of a "mediator" by the Ministry of Labour on April 11th. The parties met with the mediator April 21, 1983. On April 22nd the complainant began a legal strike. The complainant alleges that no negotiations whatsoever took place during the period April 22 to September 26, 1983. On September 26th, officials of the union met with Jim Heather, a consultant who had negotiated for the respondent in previous years but had not been directly involved in the 1983 negotiations. At this meeting, the complainant says, the union put forward a settlement offer to which it had not, to the date the complaint was filed, received a response.

3. The complaint was summarized in paragraph 14 of the complaint's further particulars filed November 15, 1983, in the following way:

The union asserts that from the commencement of negotiations, and at the very least from the commencement of the strike in April 1983, the respondent employer has formed an intention not to bargain and not to enter into a collective agreement with the applicant union and has engaged in superficial surface bargaining with no intention of entering into an agreement, and indeed since the commencement of the strike has refused to meet and bargain at all.

The existence of this intention is something which the complainant claims can be inferred from the positions taken by and behaviour of the respondent at bargaining meetings and on other occasions during the period up to the filing of the complaint, October 21, 1983.

4. The trade union's complaint was enlarged prior to the hearing of January 10, 1984, by additional allegations set out in a letter to the Board dated January 3, 1984. Those additional allegations were as follows:

1. On November 24, 1983 following the last hearing at the Ontario Labour Relations Board the employer and the union met in negotiations. J. Heather and J. Shaw represented the employer.

2. The employer bargained in bad faith, did not make every reasonable effort to reach a collective agreement, and indeed sought to avoid any collective agreement being entered into by:

- (a) withdrawing and notifying the union for the first time that the previous wage increase offer no longer applied and that it would only agree to a one year agreement with no wage increase;

- (b) indicating that while it would be willing to be flexible with regard to some of the union's non-monetary proposals, it would only table its position with respect to them if the union agreed to concessions on benefits, including long term disability and dental premiums, OHIP, etc. The employer had not previously demanded such concessions throughout the prior negotiations.

When the hearing continued January 10th, the trade union's representative in bargaining was still giving his evidence-in-chief for the trade union. The respondent did not object to the complainant enlarging its complaint to include the above-quoted allegations, and the complainant's witness testified with respect to the meeting of November 24, 1983 and was cross-examined on that subject and others on January 10 and 12, 1984. The cross-examination and re-examination of that witness were completed January 12th. The hearing was then adjourned to February 3rd, and the parties agreed to meet and bargain again before then, in the hope of settling both a collective agreement and this complaint. Regrettably, the parties settled neither. Indeed, when the hearing resumed February 3, 1984, the Board had before it a letter dated January 31, 1984 from counsel for the complainant setting out additional allegations with respect to positions taken at a meeting of January 23, 1983 and the cancellation of a meeting set for January 24, 1984. For the present purpose it is necessary only to quote the following portion of those additional allegations:

..., it is alleged that by its overall position and in particular by insisting that striking employees would have to accept concessions with respect to benefits, and by continuing to refuse to adhere to its initial wage offer, the employer attempted to ensure that no collective agreement would be arrived at. The employer position with regard to the wages and benefits of the striking unionized employees is being taken notwithstanding that higher wages and benefits are being paid to non-union employees and to strike replacements.

5. At the opening of the hearing of February 3, 1984, the respondent's representative said he had no objection whatsoever to the Board hearing evidence with respect to the bargaining-related events which had occurred since the last hearing date, and had no objection to the complainant recalling its witness to deal with those matters. He did, however, take strong objection to a summons the complainant had served on John Shaw. John Shaw is an officer of the respondent. He is said to have represented the respondent in its bargaining with the complainant. He has been in constant attendance at the Board hearings in this matter, as an advisor to the respondent's representative. It is the announced intention of the respondent's representative to call Mr. Shaw as a witness in this case. The respondent's representative did not object to the summons insofar as it commanded Mr. Shaw to be present at the Board's hearing of February 3, 1984. His complaint was with respect to that portion of the summons which commanded Mr. Shaw

to bring with you and produce at such time and place all payroll and benefit records of the company for all employees for the period April 1, 1983 to date.

The respondent's representative also objected to the Board hearing any evidence with respect to the allegation that the concessions demanded in bargaining were improper insofar as they offered lower wages and benefits than were currently being paid to non-union employees and to strike replacements.

6. The respondent's representative argued that the documents sought in the summons were irrelevant and that the use of the summons constituted a "fishing expedition". The allegation with respect to wages and benefits of strike replacements had not been raised in a timely fashion, he said, because the request for concessions was not a new factor. That had occurred in November, 1983, and had been raised in complainant's letter of January 3, 1984; anything related to that factor should have been alleged at that time, he argued. Counsel for the complainant acknowledged that that bargaining behaviour in relation to wages and benefits had occurred at the November 24, 1983 bargaining session referred to in his letter of January 3, 1984. He said this had led the complainant to investigate the level of wages and benefits being paid to strike replacements, in order to make a responsible decision whether to raise that aspect as an additional allegation in this matter and seek the best evidence to support the allegation by means of a summons of the sort now in question. Counsel pointed out the obvious difficulty the complainant faced in attempting to obtain information with respect to wages and benefits being paid to strike replacements whose interests were at odds with those of the complainant. Having eventually obtained information that strike replacements were receiving wages and benefits in excess of those then being offered in collective bargaining, the complainant determined to serve the summons in question. Counsel for the complainant pointed out that the respondent had not yet opened its case and that the respondent's representative

had indicated an intention to call both John Shaw and Jim Heather. He argued that he would be entitled to ask both witnesses about the respondent's operations during the strike. He also argued that the respondent would have to explain the withdrawal of its earlier wage offer, the demands for concessions and the timing of those events, and that the company's economic position and changes in that position during the strike were relevant to an assessment of the respondent's motivation in taking those positions at the times it did. In reply, the respondent's representative said that the complainant could call as a witness the source of its information with respect to wages and benefits paid to strike replacements, and therefore did not need production of the respondent's records in that regard. He also argued that the use of the summons to require the production of documents was abusive. While conceding that Mr. Shaw could be asked questions in cross-examination, he said that the problem the complainant would have would be that if counsel got an answer he didn't like, he would be stuck with it. Counsel for the respondent characterized the summons of documents as an improper attempt to avoid this problem.

7. After retiring to consider the submissions of counsel, the Board ruled orally that it would hear evidence with respect to all of the allegations raised by counsel for the complainant in his letter of January 31, 1984, and for that purpose would permit the complainant to reopen its case. The Board further ruled that it saw no objection to the *duces tecum* portion of the summons directed to Mr. Shaw, except to the extent that the reference to "all employees" would include office employees and members of management. The relevance of the wages and benefits of those employees had not been expressly addressed in the initial submissions, and the Board invited further submissions on that point.

8. Counsel for the complainant argued three grounds for relevance of office and managerial wages, salaries and benefits. Firstly, he said there was a historical linkage between the wages and benefits enjoyed by plant workers and those enjoyed by office workers. Because of that linkage, information with respect to the wages and benefits enjoyed by office workers at the time the respondent requested wages and benefit concessions from striking plant workers would be relevant to assessing the motivation of the respondent in requesting those concessions. Secondly, during the strike managerial and office employees had been engaged in production work normally performed by the striking production workers, and in that respect the wages, salaries and benefits paid to them were just as relevant as the wages and benefits paid to employees hired as strike replacements in assessing the motivation for the respondent's take-backs and concession demands in its bargaining with the replaced workers' representatives. Finally, counsel for the complainant argued that the economics of the respondent's operations during the strike would generally be relevant to assessing whether economics played any real part in the positions taken by the respondent in bargaining from and after September 19, 1983.

9. With respect to the trade union's first point, the respondent's representative *conceded* a historical linkage between benefits (but not wages) of plant and office workers, and said he planned to lead evidence to establish that the respondent would alter the benefit package enjoyed by office workers to match the package ultimately negotiated for the bargaining unit, when that contract is settled. With respect to the second point, and in response to the Board's questions, the respondent's representative advised that there were approximately 15 strike replacements hired exclusively to perform production work, that some salaried office employees had performed production work while continuing to perform office functions, and that members of management might also have performed some production work during the strike. He took the position that information concerning the salaries and benefits of the office

and managerial employees was "confidential", and that the complainant and the Board should be satisfied with his "admission" that salaried employees continued to receive the same salary and benefits during the strike as they had enjoyed prior to the strike. He did not respond specifically to the argument that the respondent's bargaining behaviour had made its economic position relevant, other than to repeat the respondent's concern about the "confidentiality" of information with respect to office and managerial salaries and benefits. He did not disclaim reliance on an economic explanation for the respondent's change of position at the bargaining table.

10. After retiring to consider these further submissions, the Board ruled orally that the records producible pursuant to the summons would be payroll and benefit records with respect to those employees who had at any time from and after April 1, 1983 performed any work similar in nature to work performed prior to the strike by employees in the bargaining unit represented by the complainant. The Board then adjourned, making the suggestion that the respondent permit counsel for the complainant the opportunity to review the documents in question in order to expedite the proceedings. The parties met for some time during which, we were told, they had made further unsuccessful efforts to resolve this complaint and settle a collective agreement. When the hearing resumed, we were advised by counsel for the complainant that he had been shown documentation with respect to hourly-rated employees hired as strike replacements, but not the payroll and benefit records of the company for salaried employees who had, during the strike, performed work as described in the Board's oral ruling. The respondent's representative advised the Board that the decision not to give up that information was based on the respondent's belief that it was justified in doing so because the information was "confidential". He emphasized the family nature of the business and the small community within which it is located. He said the company officers had difficulty understanding what was going on. He requested written reasons for the Board's earlier ruling with respect to the producibility of payroll and benefit records of any salaried managerial employees. He said the respondent wished to consider an application to the courts on that issue. He conceded that the summons had been properly served on Mr. Shaw, and that the documents in issue were in his power or possession.

11. Counsel for the complainant noted that there was insufficient time left in the day to reach the point in evidence at which he would attempt to introduce the disputed documents and have their admissibility individually determined. Counsel expressed concern lest this dispute remain unresolved until that point, which might not occur for several weeks because of scheduling difficulties, and noted that further delay would then be created if it was at that point that court proceedings became necessary either to review or to enforce the summons. Counsel for the complainant therefore asked the Board for an affirmative order directing production of records of the nature described in its earlier oral ruling on the propriety of the summons. The Board invited counsel to supplement their earlier arguments with any additional material they felt the Board should consider in disposing of this request. After hearing the submissions of counsel, the Board advised the parties that it would reserve its decision on the complainant's request. The hearing was then adjourned, and is now scheduled for continuation in May.

II

12. We will begin our evaluation of the complainant's request with an elaboration of the basis for our ruling on the propriety of the summons issued to the respondent's officer, John Shaw.

13. The complainant accuses the respondent of failure to comply with its duty under section 15 of the Act: to "bargain in good faith and make every reasonable effort to make a collective agreement". It says the respondent secretly wants to avoid making an agreement. The respondent's denial that this is so will ultimately be judged in the context of the parties' conduct in bargaining. A part of the complainant's case is that during the period September 1983 to January 1984, in response to the trade union's moderation of its bargaining position and abandonment of a number of bargaining demands, the respondent introduced new demands for concessions not previously sought and withdrew economic terms it had previously offered. Left unexplained, such behaviour is more consistent with a desire to avoid agreement than a desire to make one. In *Fotomat Canada Limited*, [1980] OLRB Rep. Oct. 1397, after reviewing a series of American authorities, the Board noted that:

33. Ontario cases also make it clear that a sudden unexplained change in the bargaining stance of one of the parties can raise serious doubts about that party's good faith. In *Graphic Centre*, [1976] OLRB Rep. May 221 the Ontario Board said:

"The tabling of additional demands after a dispute has been defined must, in the absence of compelling evidence which would justify such a course, be construed as a violation of the duty to bargain in good faith."

On the other hand, a previously made offer was withdrawn without a section 14 violation being found in the case of *Toronto Jewellery Manufacturers' Association*, [1979] OLRB Rep. July 719. The complainant union attempted to accept a proposal made over two months prior to the date the membership voted to accept the proposal. The union argued first that a collective agreement was in effect by virtue of the offer and acceptance. In the alternative it was argued that the respondent was in breach of section 14 in not holding to its previous position. In finding that there was no such breach, the Board made the following comments:

"The complainant, after determining that no further proposal was forthcoming, then resorted to the ultimate form of rejection by embarking on a strike. Is it entitled to expect, after being on strike for up to three weeks, that the offer is still there for the taking? It would seem from the Association's silence that it thinks not, however, that is a matter for the Board to determine. Having regard to the Board's comments in *Pine Ridge*, *supra*, about the collective bargaining process, it would be naive in the extreme for parties to collective bargaining to expect that conditions which prevailed before a strike or lockout to still prevail afterward. That is not to say that both parties might not see it to be in their best interests to agree to pick up bargaining where they left off before a strike or lockout; rather it is to say that neither party is entitled to rely on that being the situation. The Board's jurisprudence on section 14 complaints recognizes this reality when it is dealing with the refusal of one party to resume bargaining during or following a strike or lockout. One of the factors

the Board takes into account is whether the party requesting that bargaining be resumed has indicated that it is prepared to make significant concessions from its position prior to the onset of economic sanction. In the absence of such an indication, the Board usually will not find a refusal to resume bargaining to be a section 14 violation. the evidence in this case establishes that the complainant, by going on strike, has taken its best shot at the Association to try and get an improved settlement offer. It has failed and is now trying to salvage the terms which were available before the strike.”

14. This issue was also addressed in *Wilson Automotive (Belleville) Ltd.*, [1980] OLRB Rep. July 1136, in the following terms:

7. We start with the long held view of this Board that “the parties are best able to fashion the law which is to govern the workplace and that the terms of an agreement are most acceptable when the parties who live under them have played the primary role in their enactment.” (See the *DeVilbiss (Canada) Ltd.* case, [1976] OLRB Rep. March 49 at para. 13.) This Board recognizes the concept of voluntarism as relied upon by the respondent company. As a general proposition a party is free to take whatever position best satisfies its self interest providing it maintains the intention of concluding a collective agreement. The difficult cases arise where a party tables a position which it maintains is legitimately in its self interest but which the other side maintains is destructive of the process or designed to avoid a collective agreement and to undermine the trade union. In the *Pine Ridge District Health Unit* case, [1977] OLRB Rep. Feb. 65 the Board noted:

“Collective bargaining does not take place in a vacuum or in a period where time and events are frozen. Generally, as in this case, it occurs over an extended period of time against a fluid backdrop of events. A party may thus come to reshape its view of its own best interests from one point in time to another and so wish to change its position at the bargaining table. The party opposite cannot be taken to be unaware of the increasing likelihood of that happening with the passing of each successive day and week. The old caution, “Take it before I change my mind” reflects a widely accepted bargaining precept that has its proper application in collective bargaining ...”

(See also *Toronto Jewellery Manufacturers’ Association* [1979] OLRB Rep. July 719).

However, the Board’s views as expressed in the *Pine Ridge District Health Unit* case, *supra*, cannot be taken as a carte blanche to alter one’s bargaining position at any time and for any reason. Clearly, an alteration of position designed to wreck the critical decision-making framework necessary for collective bargaining would be contrary to section 14 of the Act. (See the *Graphic Centre (Ontario) Inc.* case, [1976] OLRB Rep. May 221.) Similarly, the move to a position tailor-made for rejection

would betray an intention not to conclude a collective agreement contrary to the duty imposed by section 14 of the Act. It follows, therefore, that while the parties may govern themselves by self-interest and may alter bargaining positions in response to changes in relevant conditions, a party which alters its bargaining position may leave itself open to the allegation that it is bargaining in bad faith. It falls to the Board in these cases to examine the evidence in light of the labour relations dynamics and draw the appropriate inferences.

In *Wilson Automotive Limited*, the complainant trade union had initiated a lawful strike; the respondent employer had simultaneously implemented the last offer it had made to the trade union. Some employees in the bargaining unit continued to work; they received the benefit of that last offer. The employer suffered substantial losses as a result of the strike, but made no change in its position on economic issues until 12 days before the expiry of the 6-month period during which employees engaged in a lawful strike are entitled to claim their jobs under section 73 of the Act. At that point, the employer took the position that the offer it had implemented at the outset of the strike would have to be reduced by the unspecified losses the company had since experienced, and could not remain open for acceptance in its original terms. The employer did not then or at any time earlier reduce the rates of pay or benefits of employees who had continued to work at the outset of the strike or had later exercised the right to return to work under section 73 of the Act. The Board noted at paragraph 10 of its decision that:

A natural suspicion attaches to the motives of an employer who alters his bargaining position at a critical stage in negotiations; When the employer who is revising his position in this manner has paid those working during and after a strike on the basis of his last pre-strike offer and has not unilaterally cut these rates in response to changing economic conditions as he is entitled to do, the Board must draw the inference that the employer no longer has the intention of entering into a collective agreement.

15. As will be apparent from the foregoing, where an employer changes its bargaining position in the manner alleged by the complainant in this case, the terms and conditions of employment of those doing the work of striking employees become relevant as do, indeed, the economic circumstances generally of the employer. It is difficult to imagine a justification for the changes in bargaining position alleged by the complainant, unless it is that the changes were in response to changing economic circumstances of the respondent. The respondent's representative has not argued that there is any other explanation. Indeed, he has not indicated what the explanation will be. Of course, the respondent is not obliged to particularize its defence at this stage. At the same time, however, counsel for the complainant is entitled to anticipate that the defence may be an orthodox one, and on that assumption seek to ensure that he has the best evidence available to cast doubt on that defence. The complainant is not obliged to accept as true statements of fact made by the respondent's representative, even if enticingly described as "admissions".

16. In short, the respondent's labour costs involved in continuing production during the strike, whether the labour was that of an employee freshly hired as a strike replacement or one temporarily doing double duty as a production worker in conjunction with or in lieu of

his or her normal functions as an office worker or manager, could be relevant to a determination of the issues before the Board in this case. The ultimate relevance of the information sought need not and can not be resolved at this stage. That is a matter the Board can determine only when all the evidence is in. It is enough that information in the documents might be relevant, and that the documents sought might be admissible. (See *Re Chelsea Inn*, (1979) 11 C.P.C. 239 (Ont. Div. Ct.)).

III

17. The Board's power to compel the production of documents is found in subparagraph 103(2)(a) of the Act which reads as follows:

103.-(2) Without limiting the generality of subsection (1), the Board has power,

- (a) to summon and enforce the attendance of witnesses and compel them to give oral or written evidence on oath, and to produce such documents and things as the Board considers requisite to the full investigation and consideration of matters within its jurisdiction in the same manner as a court of record in civil cases.

By analogy with proceedings in civil courts, the summons (sometimes referred to as "subpoena") *duces tecum* is the usual, although perhaps not the only, instrument by which this power is exercised. As the Board noted in *The Becker Milk Company Limited*, [1974] OLRB Rep. Oct. 732 at paragraph 7:

7. Obviously this power is a substantial one and must be exercised in a very circumspect manner. A subpoena *duces tecum* cannot be used as an instrument to harass or to annoy unreasonably an opponent; (see *Rene v. Carling Export Brewing Co.* (1927), 61 O.L.R. 495; *Clemens v. Crown Trust Co.* [1953] O.R. 87 at p. 94, [1952] O.W.N. 434; and *Brittain Steel Fabricators Ltd. v. Amiable* (1967), 64 D.L.R. (2d) 663 (B.C.)). And a subpoena *duces tecum* should state with reasonable particularity the documents which are to be produced; (see *A.G. v. Wilson*, 9 Sim. 526 at 529; *Earl of Powis v. Negus* [1923] 1 Ch. 186 at 190; *The Commissioner for Railways v. Small*, *supra*, and *Lee v. Angas* (1866), L.R. 2 Eq. 59). Furthermore, although the limits of this principle are vague, a subpoena *duces tecum* should not be used "for the purpose of fishing, i.e., endeavouring, not to obtain evidence to support [a] case, but to discover whether [one] has a case at all"; (see *The Commissioner for Railways v. Small*, *supra*, at p. 575; *Hennessy v. Wright* 24 O.B.D. 445 at 448; *Griebart v. Morris* [1920] 1 K.B. 659 at 666). And finally, a subpoena to a party will be set aside as abusive if great numbers of documents are called for and it appears that they are not sufficiently relevant; (see *Steele v. Savory* [1891] W.N. 195).

While it is important to consider the way courts handle these issues, the Board noted in the *Becker Milk* case at paragraph 5 that:

... it is equally as important to note the big differences between the Ontario Labour Relations Board's procedures and a civil court's in order to assess just how closely the "civil approach" should be followed. In this regard, no discovery accompanies the Board's procedures hence hearings before the Board cannot be completely analogized to hearings in civil matters, and *a fortiori*, the subpoena *duces tecum* (used by both the Board and the courts) may not have an identical nature in both proceedings. In other words, not only should this Board examine the judicial pronouncements depicting the nature of the subpoena *duces tecum* but it should go on to consider some of the principles that circumscribe the discovery procedures of a civil court.

In the *Becker Milk* case, the application of these principles resulted in the Board's narrowing the scope of a broad subpoena by refusing to enforce it with respect to certain portions by which the complainant sought a potentially great number of documents which the Board said were not, at that time, "sufficiently relevant". The Board went on to say:

9. Having made these rulings, the Board wishes both to emphasize that it is not precluding the complainants' requests for all time, and to justify the part of the subpoena that continues to apply to the records of those employees who have been dismissed within the period January 1, 1971 to January 3, 1974. A balance of convenience must be struck in these matters. We recognize that some "discovering" must go on by way of the subpoena *duces tecum* and that the courts can afford to take a narrower view because of the availability of a discovery process to civil litigants. A party to a civil proceeding has a right to obtain from his opponent discovery of anything which can fairly be said to be material to enable him to ascertain his own case or to destroy the case set up against him; ...

18. The respondent contended that the records in question are "confidential". No explanation of this nomenclature was offered by the respondent's representative. There was no suggestion that the records or the information in them were the subject of any statutory or common law privilege (see *Extendicare Ltd.*, [1979] OLRB Rep. July 641; *Ontario Humane Society*, [1980] OLRB Rep. Dec. 1776). It was not argued, and is by no means apparent, that the documents or information in them came into the possession of the respondent as a result of a confidential communication (a necessary, although not sufficient, condition to establishing a qualified privilege: see *Slavutych v. Baker et al.*, [1976] S.C.R. 254; [1975] 4 W.W.R. 620; (1975) 55 D.L.R. (3d) 224 (S.C.C.) at p. 260 S.C.R., p. 625 W.W.R., p. 228 D.L.R.; *D. v. National Society for the Prevention of Cruelty to Children*, [1977] 1 All E.R. 589 (H.L.)). We conclude that the respondent used the word "confidential" to describe that which is personal, not public: that which it does not wish to reveal. This lay reaction to a production requirement is not unusual; it often occurs at the discovery stage in civil proceedings, as noted in the following passage from *Riddick v. Thames Board Mills*, [1977] 3 All E.R. 677 (C.A.) per Lord Denning at p. 687b:

Discovery of documents is a most valuable aid in the doing of justice. The court orders the parties to a suit, both of them, to disclose on oath all documents in their possession or power relating to the matters in issue

in the action. Many litigants feel that this is unfair. I have often known a party, faced with such an order, saying to his solicitor: 'Need I disclose this document to the other side? It will damage our case greatly if they get to know of it.' The solicitor's answer is, and must be: 'Yes, you must disclose it, however much it damages your case.' Again I have known a party to say to his solicitor: 'But these are my own confidential papers, my own personal diary, our own inter-departmental memoranda. Must I disclose them?' The answer of the solicitor again is: 'Yes, you must disclose them.' Confidential information has no privilege from disclosure: see *Alfred Crompton Amusement Machines Ltd. v. Customs & Excise Comrs (No. 2)*. The court insists on your producing them so as to do justice in the case.

The reason for compelling discovery of documents in this way lies in the public interest in discovering the truth so that justice may be done between the parties. That public interest is to be put into the scales against the public interest in preserving privacy and protecting confidential information. The balance comes down in the ordinary way in favour of the public interest of discovering the truth, i.e. in making full disclosure.

Lord Denning went on to observe that there are certain important consequences to the use of legal compulsion to force disclosure of private documents (p. 687f):

Compulsion is an invasion of a private right to keep one's documents to oneself. The public interest in privacy and confidence demands that this compulsion should not be pressed further than the course of justice requires. The courts should, therefore, not allow the other party, or anyone else, to use the documents for any ulterior or alien purpose. Otherwise the courts themselves would be doing injustice. Very often a party may disclose documents, such as inter-departmental memoranda, containing criticisms of other people or suggestions of negligence or misconduct. If these were permitted to found actions of libel, you would find that an order for discovery would be counter-productive. The inter-departmental memoranda would be lost or destroyed or said never to have existed. In order to encourage openness and fairness, the public interest requires that documents disclosed on discovery are not to be made use of except for the purpose of the action in which they are disclosed. They are not to be made a ground for comments in the newspapers, or for bringing a libel action, or for any other alien purpose. The principle was stated in a work of the highest authority 93 years ago by Bray J:

'A party who has obtained access to his adversary's documents under an order for production has no right to make their contents public or communicate them to any stranger to the suit: nor to use them or copies of them for any collateral object ... If necessary an undertaking to that effect will be made a condition of granting an order.'

Since that time such an undertaking has always been implied, as Jenkins J said in *Alterskye v. Scott*. A party who seeks discovery of documents

gets it on condition that he will make use of them only for the purposes of that action, and no other purpose. The modern authorities are well discussed by Talbot J in *Distillers Co. (Biochemicals) Ltd. v. Times Newspapers Ltd.*, and I would accept all he says, particularly as to the weighing of the public interests involved.

See also *Alterskye v. Scott*, [1948] 1 All E.R. 469 (Ch.D.); *The Distillers Co. (Biochemicals) Ltd. v. Times Newspapers Ltd.*, [1975] 1 All E.R. 41 (Q.B.); *Church of Scientology of California v. Department of Health and Social Security et al.*, [1979] 3 All E.R. 97 (C.A.); *Williams v. Home Office*, [1981] 1 All E.R. 1151; *Home Office v. Harman*, [1981] 2 All E.R. 349 (Q.B.D. and C.A.); aff'd [1982] 1 All E.R. 532 (H.L.); *ITC Film Distributors v. Video Exchange Ltd. et al.*, [1982] 2 All E.R. 241; *Anderson v. Anderson* (1980) 14 C.P.C. 87 (Ont. H.C.) at p. 91; and, *Haliburton Co. v. Northstar Drillstem Ltd.*, (1982) 65 C.P.R. (2d) 122 (F.C.). Although the passages and cases just cited all concern production of documents on discovery in civil actions, the principles set out therein bear equal application to any legally compelled production of documents which occurs in the course of a quasi-judicial proceeding otherwise than upon the admission of the documents into evidence in a public hearing.

19. Although the custodian of a document is described as a witness in the context of the issuance and enforcement of a summons *duces tecum*, it is not necessary for the party seeking the document to call that person as its witness. The person summoned may be called upon to say whether the documents described in the summons exist and, if they do, to produce them without first being sworn. Upon production being made, the party seeking production is entitled to prove the documents through some other witness: see *Heart Construction Co. Ltd.*, [1983] OLRB Rep. Jan. 84, and the authorities referred to therein. Production pursuant to the summons therefore precedes the attempted introduction of those documents into evidence. The witness through whom the attempt is made need not be the custodian, nor need he necessarily be a witness called by the party seeking production. Indeed, it may be that no witness is necessary when, for example, some statutory provision so permits or the document's relevance springs entirely from the fact that it was in the possession of the person producing it. In any event, the party attempting to introduce a document into evidence must necessarily see it before the attempt is made. Others may have to see it, in order to intelligently resolve any dispute over its admissibility. The contents of a party's confidential documents may thus become known to others before the documents are admitted in evidence. Documents so produced may sometimes not be admitted or, if circumstances warrant, admitted only *in camera* (see section 9, *Statutory Powers Procedure Act*, R.S.O. 1980, c.484). In our view, there is an implied undertaking by a party to whom documents are produced as a result of the use of a summons *duces tecum* issued by the Board. It is an undertaking to the Board as much as to the party from whom production is compelled. The undertaking is that the documents will not be used for collateral or ulterior purposes. The undertaking is similar in scope and effect to the undertaking discussed in the cases cited above. Breach of the latter undertaking is a contempt of court, as is the breach of any undertaking given to a court. By virtue of section 13(c) of the *Statutory Powers Procedures Act*, breach of an undertaking to the Board may be the subject of contempt proceedings in the Supreme Court of Ontario; that court's power to punish for "contempt of the Board" is not limited to cases of failure of witnesses to attend, testify or produce documents: *Re Ajax and Pickering General Hospital et al. and Canadian Union of Public Employees et al.* (1981) 32 O.R. (2d) 492 (Ont. Div. Ct.); reversed on other grounds at (1982) 35 O.R. (2d) 293; 82 CLLC ¶14,164 (Ont. C.A.).

20. Having dwelt at length on the restraints on abuse which come into play when resort

is had to the summons *duces tecum*, we should make it clear that there is no suggestion that the complainant or its counsel intend or would permit improper use of the documents of which they ask the Board to order production by Mr. Shaw. The respondent's representative expressed no such concern.

21. With the limitation set by our oral ruling (see ¶10, *supra*), we are satisfied the documents sought in the subject summons ought to be produced. We will affirmatively order their production. As noted earlier, there is no requirement that their custodian, Mr. Shaw, be the complainant's witness for the purpose of introducing the documents into evidence. Production need not await the point at which Mr. Shaw takes the stand, nor does the obligation to produce depend on his doing so. Had this ruling been made at the hearing while Mr. Shaw was present, we would have ordered the immediate deposit of the documents with the Board pending any attempt to introduce them into evidence. The Board would then have adjourned to permit counsel for the complainant an opportunity to examine the documents produced (see *Metropolitan Toronto Board of Commissioners of Police, at al and Ontario Human Rights Commission, et al*, (1979) 27 O.R. (2d) 48 (Div. Ct.) at p. 53).

22. Production need not now await the next scheduled sittings of the Board in this matter. The Board's jurisdiction is broad enough to permit a different approach, if necessary. For example, in *E. Del Medico Limited*, [1970] OLRB Rep. June 383, the trade union applicant for certification had served the president of the respondent employer with a summons requiring that he bring with him to the hearing certain documents which would have revealed the number and classification of the respondent's employees employed on the date of execution of a collective agreement between the respondent and one of the intervener trade unions. The respondent's president attended the hearing, acknowledged that his records would disclose the facts sought, and stated, without explanation, that he had failed to bring those records with him. In response, the Board appointed a Labour Relations Officer to inquire into and report to the Board on the names and classifications of all employees of the respondent employed as of the relevant date. The Board further directed the respondent to provide the examiner with the records originally specified in the summons *duces tecum* with which the respondent's president had been served.

23. There have, of course, been major bad faith bargaining cases in which the complainant was found entitled to recover substantial damages in amounts which remained to be quantified in subsequent hearings; e.g. *Radio Shack*, [1979] OLRB Rep. Dec. 1220; *Westinghouse Canada Limited*, [1980] OLRB Rep. April 577; *Fotomat Canada Limited*, [1980] OLRB Rep. Oct. 1397 and [1981] OLRB Rep. Feb. 145 and *Canada Cement Lafarge Ltd.*, [1980] OLRB Rep. Nov. 1583 and [1981] OLRB Rep. Dec. 1722. Claims for damages of this sort by their nature involve examination of extensive documentary evidence, tracing the losses of and expenditures by the employees, trade union or employer, as the case may be, arising out of the failure of the opposite party to bargain in good faith. In *Canada Cement Lafarge Ltd.*, [1981] OLRB Rep. Dec. 1722 at 1732, the Board noted that motions requesting production of documents had been entertained by the Board in such cases, and granted, in whole or in part, pursuant to the Board's powers under section 103(2)(a) of the *Labour Relations Act*:

... in some of these cases, a Labour Relations Officer has been appointed by the Board to facilitate the exchange of material between the parties and to assist in settlement efforts. Clearly, if such cases are to be litigated

fairly and, particularly, if there is to be any chance of settlement, full and frank disclosure by the parties of both the detailed particulars of a damage claim and the documentary evidence that will be relied upon must occur prior to a hearing before the Board.

24. We are satisfied we should go farther in this case than simply to require that the documents be produced on the next day fixed for the hearing for this matter. The respondent has suggested it may seek judicial review of our ruling. Even if the respondent does not apply for judicial review, the complainant would have to apply to the Court to enforce our order if Mr. Shaw contravenes our ruling. If the intervention of the courts is desired by either party, our order should ensure that both parties are in a position to bring their application at the earliest opportunity. The complainant will not be in that position unless and until there has been a demonstrable failure to comply with a specific order of this Board.

25. In this case, the documents to be produced are not so voluminous, complex or uncertain of identification as to require the formal intervention of a Labour Relations Officer in the production process. By analogy with the procedure which would have pertained had our order been made and complied with on the last day of hearing in this matter, our order now will be that the documents be filed with the Registrar on or before a date which the parties will be at liberty to adjust by agreement. This will afford the parties the opportunity to make more informal arrangements with respect to production, if so advised. At the same time, it will give the complainant the opportunity to establish a clear basis for application to the Ontario Supreme Court pursuant to the provisions of the *Statutory Powers Procedure Act*, R.S.O. 1980, c.484, if the respondent persists in its refusal to produce the documents which are the subject of our order. In order to avoid any unnecessary disruption to the respondent's operation, the respondent will be permitted to comply with our direction by filing with the Board a notarially certified true copy of any or all of the documents in question, in place of the originals; in that event, Mr. Shaw will remain obliged to produce the originals at the continued hearings in this matter. Finally, any duly authorized representative of the complainant will be afforded the opportunity to examine any records filed with the Board during the Board's normal business hours upon proof satisfactory to the Registrar or his deputy that the respondent's representative has been given at least 48 hours' notice of the proposed time of attendance at the Board's offices for those purposes.

26. The Board therefore orders and directs as follows:

- (a) John Shaw is hereby ordered to produce all payroll and benefit records of Shaw-Almex Industries Limited for the period April 1, 1983 to date with respect to all employees who at any time during that period performed work similar in nature to work performed prior to April 1, 1983 by any person covered by the collective agreement between the complainant and respondent which expired January 31, 1983;
- (b) production of the aforesaid documents shall be made by depositing the said documents with the Registrar of the Ontario Labour Relations Board at the Board's offices at 400 University Avenue in the City of Toronto within ten days following the date of release of this decision or forty-eight hours following personal service on John Shaw

of a true copy of this decision, whichever is later, or within such further period of time as may be agreed to in writing by the complainant and respondent;

- (c) compliance with the aforesaid directions will be sufficient if John Shaw deposits within the time and at the place aforesaid either the originals of the records aforesaid or notarially certified legible true copies of the said records, but in the event any notarially certified copies are filed, John Shaw shall produce the originals of such documents on the dates and at the places and times appointed by the Board for the continuation of its hearings in this matter;
 - (d) the complainant's duly authorized representative shall be entitled to examine, at the Board's premises and during the Board's normal business hours, any documents deposited with the Registrar pursuant to the directions hereinbefore set out, upon proof satisfactory to the Registrar or his deputy that the respondent's counsel has been given at least 48 hours notice of the time of attendance of the complainant's representative for that purpose;
 - (e) during any examination of the documents pursuant to the provisions in the next proceeding subparagraph, the complainant's authorized representatives shall be permitted to take copies, at their own expense, of any documents produced, and the respondent's duly authorized representative is entitled to remain in attendance during any such examination.
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1617-83-R Graphic Communications International Union, Local 211, Applicant, v. **W. F. Stevens Reproductions Inc.**, Respondent, v. Thorn Press Limited, Intervener

Related Employer – Sale of a Business – Printing operation closing down lithographic function – Respondent entering into arrangement to use premises and equipment – Bulk of work of respondent done for closed business – Minimal pre-existing business or own equipment – Related employer declaration issued – “any other manner of disposition” in section 63 not interpreted *ejusdem generis*

BEFORE: Kevin M. Burkett, Alternate Chairman and Board Members W. G. Donnelly and W. F. Rutherford.

APPEARANCES: *Norman L. Jesin and John Neilson for the applicant; Lloyd Stevens and William Stevens for the respondent; Michael Gordon and Thomas Rogers for the intervener.*

DECISION OF THE BOARD; April 3, 1984

1. This is an application filed under section 1(4) of the *Labour Relations Act* and in the alternative under section 63 of the Act. Section 1(4) of the Act reads:

Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief by way of declaration or otherwise, as it may deem appropriate.

Section 63 of the Act reads in part:

63. (1) In this section,

(a) “business” includes a part of parts thereof;

(b) “sells” includes leases, transfers and any other manner of disposition, and “sold” and “sale” have corresponding meanings.

(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been a party thereto and, where an employer sells his business while an application for certification or termination of bargaining rights to which he is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if he were named as the employer in the application.

2. The material facts before the Board are set out below:

- Thorn Press Limited operating from 135 Railside Road, offers a full range of printing and related services, some of which it supplies itself and some of which it contracts to have performed.
- Prior to 1983 the company operated a lithographic department which employed 12 persons. As of July 1983 about 50% of Thorn's lithographic work was contracted out so that only four persons were employed by Thorn in its lithographic department.
- Thorn Press made a decision on July 19, 1983 to close its lithographic department. Notices of termination were sent to the affected employees to be effective August 19, 1983.
- Mr. William Stevens, a plant manager of a division of Bomac Batten Lithographic, was given notice of termination from Bomac Batten Lithographic when one of its major customers went into production for itself. Mr. Stevens installed equipment for developing lithographic film in his basement and commenced to carry on his own business from that location in early 1983.
- Mr. William Stevens visited McCutchen Graphics in July, 1983 for the purpose of obtaining advice with respect to the purchase of equipment and was referred to Thorn Press. Mr. Stevens visited Thorn Press for the first time on July 28, 1983 and was advised that Thorn had decided to abandon its lithographic operation and that its lithographic equipment was for sale.
- As a result of discussions which ensued involving the President of Thorn, Mr. William Stevens, and his brother Mr. Lloyd Stevens in early August, 1983 it was agreed that only Mr. William Stevens would supply lithographic work for Thorn. It was agreed that Mr. Stevens would utilize that part of the Thorn premises formerly occupied by Thorn's Lithographic department and that Mr. Stevens would use the Thorn equipment (valued at about \$15,000), (Mr. Stevens had equipment of his own valued at about \$2,000) and in return for using the premises and equipment he would pay a fee of 15% of the labour content (total billing less cost of materials) of his billings. This six-month trial arrangement was to expire at the end of February, 1984.
- W. F. Stevens Reproductions Ltd. was established to carry on the lithographic reproduction business of William Stevens, which had commenced earlier. W. F. Stevens Reproductions operates from the Thorn Press premises at 135 Railside and in addition to supplying about 50% of the lithographic reproduction work required by Thorn, services the other customers that it has. When W. F. Stevens Reproductions commenced operation at 135 Railside 80% of its work was

done for Thorn. The percentage of work presently performed for Thorn has decreased to 67%.

- Mr. John Burke, a former employee of Thorn, took a small equity position in W. F. Stevens Reproduction and together with Mr. W. Stevens and a helper that has recently been hired provides the labour input for W. F. Stevens Reproductions Inc.
- Mr. L. Stevens, the brother of William Stevens, is the controlling shareholder of W. F. Stevens Inc. The minority shareholders are Mr. W. Stevens, his wife and Mr. Burke. Thorn has no interest in W. F. Stevens Inc. and W. F. Stevens Inc. has no interest in Thorn. No one from Thorn holds a management position in W. F. Stevens Reproduction.
- Thorn has four other suppliers of lithographic reproduction work who supply the 50% of its requirements not supplied by W. F. Stevens Reproductions.

3. The union argues that the essential facts in this matter are no different than those which caused the Board to issue a section 1(4) declaration in *Re Don Mills Bindery*, [1983] OLRB Rep. Dec. 2008; a case in which the entity which took over Thorn's bindery business was found to be under the control of Thorn. The union maintains that the activities in this case are functionally interdependent and, when reference is had to the percentage of Stevens' business that is performed for Thorn and the fact that it is performed on Thorn's premises using Thorn's equipment on the basis of a verbal arrangement, a finding should be made that the two companies are under common control. Alternatively, the union submits, having regard to the broad definition of the term "disposition" in section 63 of the Act, that a sale of a business within the meaning of that section has taken place.

4. Stevens disputes that the facts in this matter are on all fours with those relied upon by the Board in *Don Mills Bindery*, *supra*. Stevens points to the existence of a pre-existing business with customers of its own and asks the Board to contrast this with the business that was set up in *Don Mills Bindery*, *supra* by the manager of Thorn's bindery department for the purpose of performing Thorn's bindery work. Stevens also points to the absence of former Thorne employees, with the exception of Mr. Burke, working for it.

5. Counsel for Thorn Press also emphasizes the factual distinctions between this case and *Don Mills Bindery*, *supra*. He points to the fact that the person who formed Don Mills Bindery was a supervisor of Thorn's while Stevens was already in business before making contact with Thorn and that at the time he did make contact Thorn had already decided to close down its lithographic department. Counsel for Thorn compares the value of the equipment in this case (\$15,000) with that in the *Don Mills Bindery* case, *supra* (\$250,000) and relies on the fact that Mr. Stevens brought equipment of his own, other than that obtained from Thorn. Counsel for Thorn Press argues that even if Thorn had Stevens removed from its premises and took back its equipment Stevens, in contrast to Don Mills Bindery, would continue in business. Counsel for Thorn argues that in these circumstances Thorn is no different than any other customer and is not able to direct the affairs of Stevens. Whereas the arrangement entered into between Thorn and Stevens is one of convenience, counsel for Thorn

argues that it does not place Thorn in a position of control as would allow the Board to issue a declaration under section 1(4) of the Act.

6. Counsel for Thorn argues in the alternative that there has been no disposition within the meaning of section 63 of the Act as would allow the Board to find that the sale of part of Thorn's business to Stevens has occurred. Relying on the *ejusdem generis* rule of construction, counsel for Thorn argues that the term "disposition" must be read in light of the specific reference to "leases" and "transfers" in the definition of sale in section 63. In the absence of a giving up of control over the premises or the equipment to Stevens, counsel for Thorn argues that the Board must find that there has been no disposition within the meaning of section 63 of the Act and dismiss the application under that section.

7. The Board has long held that the word "transfers" in section 63 of the Act is to be given a broad signification and that the words "any other manner of disposition" is not to be interpreted *ejusdem generis*, with the words "leases" or "transfers". In *Thorco Manufacturing Ltd.* 65 CLLC 16,052 the Board stated:

The word *transfers*, however, is obviously a term of wide signification and unless restricted by the context is capable of describing a multitude of transactions whether by sale, exchange, gift, trust or otherwise by which property, rights, or interests, etc. are transmitted absolutely, conditionally etc. or by operation of law from one person to another. We are unable to find anything in the language of the section to denote any legislative intention to restrict the meaning of the word transfers to any particular kind of *transfer*. Also, having regard to the particular language used and the remedial object sought to be attained by and the wide meaning which must be attributed to the preceding word *transfers*, it is our opinion that the generality of the words *any other manner of disposition* is not intended to be in any way limited by or interpreted *ejusdem generis* with the word *leases*, or *transfers*. In our opinion, it is more in harmony with the language of and the remedy envisaged by the enactment to interpret the words *and any other manner of disposition* as an omnibus or saving provision intended to include dispositions of the business or a part or parts thereof by any mode or means whatever which are not appropriately described by the preceding words which state that *sells* includes *leases* or *transfers*.

It is a rudimentary principle applicable to the construction of remedial legislation that, consistent with the language of the enactment, the interpretation which must be adopted is the one which best serves to advance the remedy and to suppress the mischief contemplated by the legislation. (See also section 10 of *The Interpretation Act* R.S.O. 160 c. 191). Having regard to this principle and to the fact that the language of the section is entirely susceptible of and in agreement with such a meaning, we are impelled to give the section a large and liberal rather than a narrow or restrictive construction.

The language of the section has not changed from 1965 and neither has the interpretation of it enunciated by the Board at that time. The submissions of counsel for Thorn have not persuaded us that we should limit the definition of the term "sale" as he suggests. Given the transfer of the premises, the equipment and that portion of Thorn's lithographic business that was previously done in-house to Stevens and given the rudimentary nature of Stevens' business prior to the transfer of these components of Thorn's lithographic business, we are satisfied that a sale of a part of a business from Thorn to Stevens Reproductions Inc. could be made in this case.

8. However, the evidence is that the transaction between Thorn Press and Stevens Reproductions has not been finalized and, as the matter now stands, we are also satisfied that Thorn retains effective control over the lithographic business that is being carried on by Stevens Reproductions at this time. In these circumstances it is our view that it is more appropriate to proceed under section 1(4).

9. We do not dispute that the facts in this case do not coincide in all respects with those relied upon in *Re Don Mills Bindery Inc.*, *supra*. There was no pre-existing business in that case and the business that was established in that case was owned and operated by an individual who had been employed as a supervisor by Thorn. In this case there is a pre-existing business operated by someone with no prior association with Thorn. The pre-existing business had some equipment of its own (valued at \$2,000) in contrast to Don Mills Bindery and that which it obtained from Thorn is valued at \$15,000 as compared to the \$250,000 of equipment Don Mills obtained from Thorn. The volume of work performed by Stevens for Thorn has decreased from 80% of its total volume of work to about 67% of its total volume of work, whereas the work performed by Don Mills Bindery for Thorn was about 90% of its total volume at the relevant times. Finally, Don Mills Bindery Inc. employed 10 former employees of Thorn while Stevens has employed only one former employee of Thorn and in addition, has hired a helper. However, notwithstanding the factual differences between the two cases, when we look at Stevens' business as it presently exists we are forced to the same conclusion as was reached by the Board in *Re Don Mills Bindery*, *supra*.

10. As in *Don Mills Bindery*, *supra* Stevens' business operates out of premises owned by Thorn at the pleasure of Thorn. There is no written lease or other agreement upon which Stevens can rely in occupying these premises against the will of Thorn. The bulk of the equipment used by Stevens is also owned by Thorn and can be taken back without notice. Finally, the bulk of the work performed by Stevens is work emanating from Thorn. The factual differences between this case and *Don Mills Bindery Inc.*, *supra*, do not change the essential nature of the relationship between Thorn and Stevens. Thorn is not simply a customer of Stevens as is suggested by counsel for Thorn. As we have observed, Thorn supplies Stevens with the bulk of its work and, in addition, has supplied most of the equipment on which that work is done, has allowed Stevens to use its premises to perform this work and can, at its own pleasure send its work elsewhere and direct Stevens to vacate its premises. As in *Don Mills Bindery Inc.* *supra* and as in *J. H. Normick Inc.*, [1979] OLRB Rep. Dec. 1176 we are satisfied that Thorn enjoys effective control over the lithographic business of Stevens Reproductions within the meaning of Section 1(4) of the Act. Furthermore, given the nature of Thorn's business which offers a full range of printing and related services including lithographic reproduction services, there can be no dispute that the activities carried out by Stevens and those carried out and provided by Thorn are related activities within the meaning of section 1(4) of the Act.

11. The remedial purpose of section 1(4) of the Act is dealt with at paragraphs 41 and 42 of *The Charming Hostess* case, [1982] OLRB Rep. April 536 as follows:

41. Because of the amendment to section 1(4) in 1975, it is not necessary that there be shared participation in a common business endeavour or even contemporaneous economic activity. The relationship between the related employer is a functional rather than a temporal one. (For a discussion of the reasons for amendment see: *Brant Erecting*, ([1980] OLRB Rep. July 945) at paragraphs 13 – 14.) Section 1(4) creates a regime of collective bargaining law which (like section 63), significantly modifies common law notions of “privacy of contract” or “the corporate veil”. But while the language of section 1(4) is very broad, the section is not intended to be applied in every case which, in a general sense, meets its statutory criteria. The Board had a discretion concerning the application of section 1(4) and, in the past, it has exercised that discretion carefully in light of the circumstances of particular cases, and labour relations policy considerations.

42. Section 1(4) does impose some limits on the degree to which an employer can avoid its obligations under a collective agreement by substituting the employees of another employer for its own – even though the arrangement may not have been undertaken for the purpose of subverting bargaining rights (in which case unfair labour practice considerations might also arise). This is especially the case where the functions performed by the employees of the other employer are carried out on the first employer’s premises, with the first employer’s equipment, in conjunction with the work performed by the first employer’s own employees, and subject to the first employer’s overall direction and control. In *The Great Atlantic and Pacific Company of Canada Limited* [1981] OLRB Rep, March 285, for example, legislation required “A & P” to create a new corporate vehicle to run the pharmacy department which it had established in its larger food stores. There was no anti-union motive, but the separate legal identity of the “drug company” was totally artificial from a collective bargaining point of view. And the Board issued a related employer declaration. The drug company was completely dominated by A & P, and had no business activities apart from it. The fact that the drug company hired employees, paid them and directed them in their daily activities did not obscure the reality of the situation.

12. In this case, because Thorn enjoys effective control over the related activities carried out by Stevens Reproductions and because these activities, which had previously been carried on by Thorn using bargaining unit employees, are carried out by Stevens on Thorn’s premises using Thorn’s equipment, it makes eminently good labour relations sense to cut through the arrangement that has been made and to exercise our discretion under section 1(4) of the Act to declare that Thorn Press and Stevens Reproduction Inc. as they presently exist, constitute one employer for the purposes of the Act. Having regard to all of the foregoing we

hereby so declare. It follows that so long as this declaration remains in effect the respondent Stevens Reproductions Inc. and Thorn Press Limited are one employer for purposes of the Act.

2606-83-U Local 280 Bartenders' & Beverage Dispensers' of H.E.R.E. International Union, Complainant, v. Wallace House, Respondent

Practice and Procedure – Unfair Labour Practice – Union Security – Allegation that failure to remit dues in breach of s.43 – Board finding no collective agreement in operation – No breach – Complainant not permitted to allege breaches of other provisions where not pleaded in complaint

BEFORE: N. B. Satterfield, Vice-Chairman and Board Members H. Kobryn and J. Wilson.

APPEARANCES: *Beth Symes, Janice McIntosh, James Jackson and Joe Leithwood for the complainant; no one for the respondent.*

DECISION OF THE BOARD; April 9, 1984

1. This is a complaint filed under section 89 of the Act in which it is alleged that the respondent has violated section 43 of the *Labour Relations Act*. The complaint as filed alleges that the respondent deducted dues from employees for whom the complainant ("Local 280") claims to be the exclusive bargaining agent for the months of October, November and December 1983 and January 1984 and failed to remit them to Local 280. The relief requested in the complaint is for a direction that the respondent remit to Local 280 "... union dues deducted from all employees...". At the hearing into the complaint, counsel for Local 280 advised the Board that the relief Local 280 is seeking is a declaration that it is the exclusive bargaining agent for the respondent's employees and a direction that the respondent remit the proper dues to Local 280.

2. Section 43 of the Act provides as follows:

43.-(1) Except in the construction industry and subject to section 47, where a trade union that is the bargaining agent for employees in a bargaining unit so requests, there shall be included in the collective agreement between the trade union and the employer of the employees a provision requiring the employer to deduct from the wages of each employee in the unit affected by the collective agreement, whether or not the employee is a member of the union, the amount of the regular union dues and to remit the amount to the trade union, forthwith.

(2) In subsection (1), "regular union dues" means,

(a) in the case of an employee who is a member of the trade union, the dues uniformly and regularly paid by a member of the trade

union in accordance with the constitution and by-laws of the trade union; and

- (b) in the case of an employee who is not a member of the trade union, the dues referred to in clause (a), excluding any amount in respect of pension, superannuation, sickness insurance or any other benefit available only to members of the trade union.

3. The Board makes the following findings of fact from the evidence led at the hearing by Local 280. As noted above in the appearances, no one appeared at the hearing to represent the respondent.

4. Local 280 has had a collective bargaining relationship with the respondent since 1953 through an unbroken series of collective agreements which, at least recently, have taken the form of a "short form" agreement between the respondent and Local 280 in which the respondent has agreed to be bound "... to all terms and conditions ..." of the collective agreement between the Hotel Association of Metropolitan Toronto and Local 280. The most recent short form agreement, by its terms, was in effect from May 1, 1981 to April 30, 1983.

5. In February 1983, Local 280 served notice to bargain on the respondent and a number of other licensed establishments. There is no evidence of any direct negotiations with the respondent but, subsequent to giving notice to bargain, Local 280 filed a request with the Minister of Labour for the appointment of a conciliation officer. The request was granted, an officer was appointed and he set a date for a meeting with the two parties. The respondent did not appear for the meeting. In September 1983, the Minister notified the respondent and Local 280 that he would not be appointing a conciliation board to deal with their dispute.

6. Shortly thereafter, Local 280 and the Hotel Association concluded a new collective agreement. In late October or early November, the assistant business agent for Local 280 presented to the respondent a copy of the new collective agreement with the association together with a short form collective agreement duly signed by Local 280 and requested the respondent to execute it. The effect of that agreement would be to bind the respondent to the terms and conditions of the collective agreement with the Hotel Association except as modified by the terms of the short form agreement. The respondent had not returned a signed copy of the agreement to Local 280 as of the date of the hearing into the complaint in spite of frequent contacts by officials of Local 280 and demands from them that the respondent sign and return to Local 280 the short form agreement. Instead, according to the union, the respondent keeps saying it will sign and return the document but fails to do so. The respondent, after last remitting dues in November 1983 for the four month period ending September 1983, ceased remitting dues altogether.

7. Union counsel argues that the respondent's actions in ignoring the conciliation process, suddenly ceasing to remit dues to the union and saying it will execute a new collective agreement but failing to do so amounts to a flagrant denial of Local 280's bargaining rights. Counsel argues that it would be unreasonable in these circumstances for it to be required to submit its dispute with the respondent to arbitration for resolution and relief. Therefore, counsel argues, the Board should not defer to the arbitration process and should take jurisdiction and determine this complaint. Counsel cited Board decisions as authority for the proposition

that, where there is a flagrant repudiation of the collective bargaining relationship, the Board will not defer to arbitration and will take jurisdiction to deal with a complaint under the Act.

8. With respect, this is not a matter of deferring to arbitration because there is no collective agreement. The last collective agreement between the respondent and Local 280 ceased to be binding on the respondent sixteen days after the Minister released to the respondent and Local 280 his "no board" report. Therefore, there are no grievance and arbitration provisions available to the parties. The bargaining rights which were incorporated in the collective agreement which expired April 30th, 1983 have not been terminated, however, merely because the agreement ceased to be binding on the parties.

9. Nor do these facts support a conclusion that there has been a violation of section 43 of the Act. There is no collective agreement in which to include the type of dues deduction provision contemplated by that section and no evidence of the respondent refusing to include in a proposed renewal of a collective agreement that type of dues deduction provision.

10. During union counsel's argument, it was submitted also that the respondent's acts and omissions constitute a violation of sections 50, 64, 66(c), 67 and 79 of the Act. Those sections were not pleaded in the complaint and the Board will not entertain them. Notice to the respondent of the complaint dealt only with the allegation of violation of section 43 of the Act. There was no request during the hearing to amend the complaint so as to include the allegation that other sections of the Act had been violated. If the Board were to consider counsel's submissions now, it would have the same effect as the Board having consented during the hearing to the complaint being amended to include fresh allegations. Had the Board done so, it would at least have adjourned the proceedings so that the respondent could be given proper notice of the amended complaint. The Board's refusal to entertain counsel's submissions that the respondent's conduct constitutes a violation of other sections of the Act is without prejudice to the complainant relying on the same evidence or new evidence to bring a fresh complaint.

11. In the result of the facts and circumstances set out above, the Board finds that although Local 280 is the exclusive bargaining agent for the respondent's employees who were included in the bargaining unit described in the collective agreement between the parties which expired April 30th, 1983, the allegations that the respondent has violated section 43 of the *Labour Relations Act* have not been made out for the reasons set out in paragraph 9 above.

12. Accordingly, this complaint is dismissed.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING MARCH 1984

BARGAINING AGENTS CERTIFIED

No Vote Conducted

0907-83-R: Hotel Employees Restaurant Employees Union, Local 75, (Applicant) v. Elias Brothers Restaurants, Inc. carrying on business as Big Boy Restaurants, (Respondent).

Unit: "all employees of the respondent at 459 Ouellette Avenue, Windsor, Ontario, save and except assistant manager, those above the rank of assistant manager, management trainees, dining room manager and office and accounting staff." (78 employees in unit). (*Having regard to the agreement of the parties*).

1036-83-R: Labourers' International Union of North America, Local 183, (Applicant) v. Massi Construction Co. Ltd., (Respondent), v. Group of Employees, (Objectors).

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville, Halton Hills, and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman." (11 employees in unit). (*Having regard to the agreement of the parties*).

1256-83-R: Labourers' International Union of North America, Ontario Provincial District Council, (Applicant) v. Central Forming and Concrete Inc., (Respondent) v. Labourers' International Union of North America, Local 506, (Intervener).

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (8 employees in unit).

Unit #2: "all construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (8 employees in unit).

1782-83-R: Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, (Applicant) v. Ontario Liquor Boards Employees' Union, (Respondent).

Unit: "all employees of the respondent in Mississauga, Ontario, save and except the President, the General Secretary and persons above the rank of General Secretary." (6 employees in unit).

1845-83-R: International Union of Operating Engineers, Local 793, (Applicant) v. Smiths Construction Company Arnprior Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of Smiths Construction Company Arnprior Limited engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and

maintaining of same, and all construction labourers and truck drivers in the employ of Smiths Construction Company Arnprior Limited within a radius of 33 kilometers (approximately 20 miles) of the North Bay post office (Board area #16), excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (59 employees in unit).

1907-83-R: Ontario Nurses' Association, (Applicant) v. International Medical Clinics (a division of Flight Medico Inc.), (Respondent).

Unit #1: "all registered and graduate nurses employed in a nursing capacity by the respondent in Eto-bicoke, Ontario, save and except Nursing Co-ordinator, persons above the rank of Nursing Co-ordinator, persons regularly employed for not more than 24 hours per week." (3 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: (*See Bargaining Agents Certified Subsequent to a Post-Hearing Vote*).

2341-83-R: United Steelworkers of America, (Applicant) v. Marley Roof Tiles Limited, (Respondent).

Unit: "all employees of the respondent in the Town of Milton, save and except foremen, persons above the rank of foreman, office and sales staff, field installation staff and students employed during the school vacation period." (15 employees in unit). (*Having regard to the agreement of the parties*).

2345-83-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W., (Applicant) v. Circle "C" Fabricating Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Windsor, Ontario, save and except foremen, those above the rank of foreman, and office and sales staff." (24 employees in unit). (*Having regard to the agreement of the parties*).

2426-83-R: International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, (UAW), (Applicant) v. Highway Stamping (Windsor) Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Sandwich South Township, Ontario, save and except foremen, those above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (29 employees in unit). (*Having regard to the representations of the parties*).

2450-83-R: Labourers' International Union of North America, Local 607, (Applicant) v. 558078 Ontario Inc., 558079 Ontario Inc., and 558080 Ontario Inc., carrying on business as Hyrec Contracting, (Respondent).

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

Unit #2: "all construction labourers in the employ of the respondent in the District of Thunder Bay, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

2463-83-R: United Brotherhood of Carpenters and Joiners of America, Local 1030, (Applicant) v. J. Steenbakkens Lumber Co. Ltd./Capital Roof Truss (1984) Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at its lumber yard and shop at 3813 Richmond Road, Nepean, Ontario, save and except foremen, persons above the rank of foreman, delivery truck drivers, office

and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (40 employees in unit). (*Having regard to the agreement of the parties*).

2465-83-R: Hotel Employees Restaurant Employees Union, Local 75, (Applicant) v. Villa Canale Hotel Inc., c.o.b. as Embassy Hotel, (Respondent).

Unit #1: “all employees of the respondent in Windsor save and except supervisors, those above the rank of supervisor, head chef, maitre’d, sales and accounts staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (4 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: (*See Bargaining Agents Certified Subsequent to a Post-Hearing Vote*).

2477-83-R: United Steelworkers of America, (Applicant) v. Nightingale Industries Limited, Nightingale Interloc Limited, and Employers Overload Company, EOC of Canada Ltd., (Respondents).

Unit: “all employees of the respondent Nightingale Industries Limited employed at 9 Hanna Avenue in the City of Toronto and all employees of Nightingale Interloc Limited in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period.” (169 employees in unit). (*Having regard to the agreement of the parties*).

2491-83-R: Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. P.J.P. Amusements Limited, (Respondent).

Unit: “all employees of the respondent at Kingston, Ontario, save and except supervisors, those above the rank of supervisor, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (3 employees in unit).

2510-83-R: The Canadian Union of Public Employees, (Applicant) v. The Regional Municipality of Peel, (Respondent).

Unit: “all nurses employed in a nursing capacity in the Department of Health of the respondent in the Regional Municipality of Peel save and except Assistant Supervisor of Nurses and persons above the rank of Assistant Supervisor.” (104 employees in unit). (*Having regard to the agreement of the parties*).

2511-83-R: The Canadian Union of Public Employees, (Applicant) v. The Doctors Hospital, (Respondent).

Unit: “all office and clerical employees of the respondent in Metropolitan Toronto, Ontario, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, secretaries of the following: Director of Nursing Services, Executive Director, Assistant Executive Director, Chief of Staff and Medical Advisory Committee, Director of Planning, Director of Environmental Services, Director of Development, Controller, Personnel Manager, Interpreter and persons covered by subsisting collective agreements.” (19 employees in unit). (*Having regard to the agreement of the parties*).

2537-83-R: The Alliance Employees’ Union, (Applicant) v. PSAC Holdings Ltd., (Respondent).

Unit: “all employees of the respondent at Ottawa, Ontario, save and except building manager and those above the rank of building manager.” (7 employees in unit). (*Having regard to the agreement of the parties*).

2562-83-R: The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters' and Joiners of America, (Applicant) v. Asquith Interior Dimensions Inc. o/a Interior Dimensions, (Respondents).

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (20 employees in unit).

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (20 employees in unit).

2564-83-R: Labourers International Union of North America, Local 183, (Applicant) v. Ellis-Don Limited, (Respondent) v. Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America, (Intervener).

Unit: "all employees of the respondent engaged in concrete forming construction on residential building projects in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman." (16 employees in unit).

2565-83-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (U.A.W.), (Applicant) v. Lean Flow Metal Products, Inc., (Respondent).

Unit: "all employees of the respondent in Brantford, save and except foremen, persons above the rank of foreman, office and sales staff, security guards, employees regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (47 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

2624-83-R: Labourers' International Union of North America, Local 183, (Applicant) v. Belmont Property Management, (Respondent).

Unit: "all employees of the respondent engaged in cleaning and maintenance at 545, 555 and 565 Sherbourne Street, Toronto, Ontario, including resident superintendents, save and except property manager and those above the rank of property manager." (11 employees in unit). (*Having regard to the agreement of the parties*).

2625-83-R: The Canadian Union of Public Employees, (Applicant) v. Youth Services Bureau of Ottawa-Carleton, (Respondent).

Unit: "all employees of the respondent in the Regional Municipality of Ottawa-Carleton regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except supervisors, co-ordinators, and persons above the rank of supervisor, co-ordinator, clerical and office employees, maintenance employees, housekeeping employees, students employed on a co-operative program with a school, college or university and persons covered by the subsisting Collective Agreement between the Youth Services Bureau of Ottawa-Carleton and the Canadian Union of Public Employees and its Local 2195." (69 employees in unit). (*Having regard to the agreement of the parties*).

2636-83-R: The Ontario Public Service Employees Union, (Applicant) v. Royal City Ambulance, Division of Vermay Enterprise Ltd., (Respondent).

Unit: "all employees of the respondent in the City of Guelph, Ontario, regularly employed for not more than twenty-four (24) hours per week, save and except supervisors, persons above the rank of supervisor, office and clerical staff." (17 employees in unit). (*Having regard to the agreement of the parties*).

2638-83-R: United Food and Commercial Workers International Union, C.L.C., AFL-CIO, (Applicant) v. The Prince Edward County Board of Education, (Respondent).

Unit: "all employees of the respondent in Prince Edward County, save and except assistant maintenance supervisors, persons above the rank of assistant maintenance supervisor, office and clerical staff, occasional teachers, special education support staff and persons covered by subsisting collective agreements and certificates." (45 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

2653-83-R: Retail, Wholesale and Department Store Union, AFL, CIO, CLC, (Applicant) v. M. Perlman Enterprises Inc. and R. Perlman Enterprises Inc. c.o.b. as Sunrise Records and Tapes, (Respondents).

Unit: "all employees of the respondent at its retail outlets in Metropolitan Toronto, save and except managers and persons above the rank of manager." (12 employees in unit). (*Having regard to the agreement of the parties*).

2658-83-R: Service Employees Union Local 210, Affiliated with Service Employees Union, AFL-CIO-CLC, (Applicant) v. Beaver Food Limited, (Respondent).

Unit: "all employees of the respondent employed at The Pine in Chatham, Ontario, save and except food supervisors and those above the rank of food supervisor." (15 employees in unit). (*Having regard to the agreement of the parties*).

2659-83-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W., (Applicant) v. Edgewind Sales & Manufacturing Limited, (Respondent).

Unit #1: "all employees of the respondent at Windsor, save and except foremen, those above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (24 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all employees of the respondent at Windsor employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except foremen, persons above the rank of foreman, office and sales staff." (4 employees in unit). (*Having regard to the agreement of the parties*).

2674-83-R: Service Employees Union, Local 204, Affiliated with the S.E.I.U., A.F. of L., C.I.O., C.L.C., (Applicant) v. Lyndhurst Hospital, (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, Ontario, regularly employed for not more than twenty-four (24) hours per week, and students employed during the school vacation period, save and except professional nursing staff, physiotherapists, occupational therapists, rehabilitation counsellors, supervisors or foremen, persons above the rank of supervisor or foreman, office staff and employees covered by subsisting collective agreements." (21 employees in unit). (*Having regard to the agreement of the parties*).

2691-83-R: International Brotherhood of Painters and Allied Trades - Local Union 1891, (Applicant) v. M. K. Drywall Ltd., (Respondent).

Unit #1: "all painters and painters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

Unit #2: "all painters and painters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

2703-83-R: United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Aristokraft Vinyl Inc., (Respondent).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period." (15 employees in unit). (*Having regard to the agreement of the parties*).

2708-83-R: Retail, Wholesale and Department Store Union, (Applicant) v. Marsh Frozen Foods, a division of Willet Foods Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at Windsor, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (31 employees in unit). (*Having regard to the agreement of the parties*).

2727-83-R: Ironworkers District Council of Ontario, (Applicant) v. Linrin Forming Ltd., (Respondent).

Unit #1: "all reinforcing rodmen in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

Unit #2: "all reinforcing rodmen in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

2728-83-R: Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351, (Applicant) v. Work Wear Corporation of Canada Ltd., (Respondent).

Unit: "all employees of the respondent in Windsor, Ontario, save and except Supervisors, persons above the rank of Supervisor, Sales Staff, Watchmen, employees covered by the Collective Agreements between the Employer and Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 and Laundry and Linen Drivers and Industrial Workers, Local 847". (4 employees in unit). (*Having regard to the agreement of the parties*).

2732-83-R: United Brotherhood of Carpenters and Joiners of America, Local 1669, (Applicant) v. 558078 Ontario Inc., 558079 Ontario Inc. and 558080 Ontario Inc., carrying on business as Hyrec Contracting, (Respondent) v. Labourers' International Union of North America, Local 607, (Intervener).

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit).

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the District of Thunder Bay, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit).

2734-83-R: International Union of Operating Engineers, Local 796, (Applicant) v. A. E. LePage Real Estate Services Limited, (Respondent).

Unit: "all employees of the respondent at College Park, Toronto, Ontario, save and except supervisors, superintendents and assistant chief operators, persons above those ranks, security personnel, office, sales, and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (29 employees in unit). (*Having regard to the agreement of the parties*).

2735-83-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 508, (Applicant) v. Mark V Enterprises Eastern Division, (Respondent).

Unit #1: "all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit).

Unit #2: "all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in the District of Thunder Bay, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit).

2770-83-R: United Brotherhood of Carpenters and Joiners of America, Local Union 785, (Applicant) v. AWL Consultants Inc., (Respondent).

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit).

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the County of Wellington, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit).

2771-83-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W., (Applicant) v. Thamesville Metal Products Limited, (Respondent).

Unit #1: "all employees of the respondent at Thamesville, save and except foremen, persons above the rank of foreman, office and sales staff, and persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (35 employees in unit). (*Having regard to the agreement of the parties*.)

Unit #2: (*See: Applications for Certification Dismissed - No Vote Conducted*).

2722-83-R: Christian Labour Association of Canada, (Applicant) v. Park Lane Nursing Home Limited, (Respondent).

Unit: "all registered and graduate nurses of the respondent employed in a nursing capacity at Paris, Ontario, save and except the Director of Nursing and persons above the rank of Director of Nursing." (2 employees in unit). (*Having regard to the agreement of the parties*).

2782-83-R: Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, (Applicant) v. Manis Metal Manufacturing Limited, (Respondent).

Unit: "all employees of the respondent in Ottawa, Ontario, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (50 employees in unit). (*Having regard to the agreement of the parties*).

2783-83-R: The Windsor Typographical Union, Local 553, I.T.U., (Applicant) v. The Windsor Star, A Division of Southam Inc., (Respondent).

Unit: "all employees of the respondent in Windsor, Ontario in the mailing department regularly employed for not more than twenty-four (24) hours per week save and except leaders, those above the rank of leader, and employees covered by subsisting collective agreements." (109 employees in unit). (*Having regard to the agreement of the parties*).

2785-83-R: United Brotherhood of Carpenters and Joiners of America, Local Union 93, (Applicant) v. Varsity Framing, (Respondent).

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (6 employees in unit).

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (6 employees in unit).

2786-83-R: Printing Specialties & Paper Products Union – Local 512, (Applicant) v. The Lindsay Paper Box Company Limited, (Respondent).

Unit: "all employees of the respondent at Lindsay, save and except foreman, persons above the rank of foreman, office, clerical and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (18 employees in unit).

2787-83-R: Labourers' International Union of North America, Local 183, (Applicant) v. 573766 Ontario Limited, (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit).

2790-83-R: Service Employees Union, Local 204, Affiliated with S.E.I.U., A.F. of L., C.I.O., C.L.C., (Applicant) v. York-Finch General Hospital, (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, Ontario, save and except professional medical staff, registered, graduate and undergraduate nurses, paramedical employees, office and clerical staff, supervisors, persons above the rank of supervisor, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period and persons covered by subsisting collective agreements." (221 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

2791-83-R: Service Employees Union, Local 204, Affiliated with S.E.I.U., A.F. of L., C.I.O., C.L.C., (Applicant) v. York-Finch General Hospital, (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, Ontario regularly employed for not more than twenty-four (24) hours per week, and students employed during the school vacation period, save and except professional medical staff, registered, graduate and undergraduate nurses, paramedical employees, office and clerical staff, supervisors and persons above the rank of supervisor, and persons covered by subsisting collective agreements." (93 employees in unit). (*Having regard to the agreement of the parties*).

2797-83-R: Health, Office and Professional Employees, a division of Local 206 United Food and Commercial Workers International Union, (Applicant) v. North Park Nursing Home Limited, (Respondent).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except registered nurses, supervisors, persons above the rank of supervisor, and office staff." (12 employees in unit). (*Having regard to the agreement of the parties*).

2806-83-R: United Steelworkers of America, (Applicant) v. Central Welding & Iron Works Owned and operated by Autogene Industries North Bay Inc., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the City of North Bay save and except foremen, those above the rank of foreman, and office and sales staff." (15 employees in unit). (*Having regard to the agreement of the parties*).

2807-83-R: United Food and Commercial Workers International Union AFL, CIO, CLC, (Applicant) v. Primo Foods Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at Cottam, Ontario, save and except supervisors, those above the rank of supervisor, office and sales staff, agricultural fieldman, seasonal employees and students employed during the school vacation period." (42 employees in unit). (*Having regard to the agreement of the parties*).

2817-83-R: The Sheet Metal Workers' International Association Local Union 397, (Applicant) v. Tri-North Sheet Metal Limited, (Respondent).

Unit #1: "all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

Unit #2: "all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in the District of Thunder Bay, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

2852-83-R: Service Employees International Union, 532 AFL, CIO, CLC, (Applicant) v. C.S.L. Services Group, A Division of Caretaking Standard Labour Services Incorporated, (Respondent).

Unit: "all employees of the respondent in Hamilton, Ontario, save and except foremen, supervisors, persons above the rank of foreman and supervisor, and persons regularly employed for not more than twenty-four (24) hours per week." (5 employees in unit).

2853-83-R: Service Employees International Union, Local 532, (Applicant) v. Downtown Convalescent Centre, (Respondent).

Unit: "all employees of the respondent employed at Hamilton, Ontario, regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except professional nursing staff, physiotherapist, occupational therapist, office and clerical staff, supervisor and persons above the rank of supervisor." (10 employees in unit). (*Having regard to the agreement of the parties*).

2858-83-R: International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, (U.A.W.), (Applicant) v. Iafate Machine Works Ltd., (Respondent).

Unit: "all employees of the respondent in Thorold, Ontario save and except foremen, persons above the rank of foreman, office, clerical and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (20 employees in unit).

2864-83-R: United Steelworkers of America, (Applicant) v. North Bay Salvage (Division of Lake Ontario Steel Company), (Respondent).

Unit: "all employees of the respondent in the City of North Bay, save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period." (3 employees in unit). (*Having regard to the agreement of the parties*).

2866-83-R: Local 47 Sheet Metal Workers' International Association, (Applicant) v. Lisi Aero-Guide Inc., (Respondent).

Unit: "all employees of the respondent at Smith Falls, Ontario save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff." (16 employees in unit). (*Having regard to the agreement of the parties*).

2924-83-R: Teamsters Local Union No. 141, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Anthes Equipment Limited, (Respondent).

Unit: "all employees of the respondent in London, Ontario, save and except foremen, those above the rank of foreman, office, clerical and sales staff." (2 employees in unit). (*Having regard to the agreement of the parties*).

2939-83-R: Laundry & Linen Drivers and Industrial Workers Union Local 847, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Work Wear Corporation of Canada Ltd., (Respondent).

Unit: "all employees of the respondent at North Bay, Ontario, save and except supervisors, those above the rank of supervisor, office, clerical and sales staff." (2 employees in unit). (*Having regard to the agreement of the parties*).

2925-83-R: The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 508, (Applicant) v. 558078 Ontario Inc., 558079 Ontario Inc., 558080 Ontario Inc., carrying on business as Hyrec Contracting, (Respondent).

Unit #1: "all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (7 employees in unit).

Unit #2: "all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in the District of Thunder Bay, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (7 employees in unit).

2945-83-R: Energy and Chemical Workers Union, (Applicant) v. H. L. Blachford Ltd./Ltee. (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at Mississauga, Ontario, save and except foremen, persons above the rank of foreman, laboratory and sales staff." (25 employees in unit).

2962-83-R: United Brotherhood of Carpenters and Joiners of America, Local 2041, (Applicant) v. Jean Bernard Drywall Reg'd, (Respondent).

Unit #1: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit).

Unit #2: "all employees of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit).

2998-83-R: International Brotherhood of Electrical Workers Local 1687, (Applicant) v. 467510 Ontario Limited o/a Barne Builders, (Respondent).

Unit #1: "all electricians and electricians' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (6 employees in unit).

Unit #2: "all electricians and electricians' apprentices in the employ of the respondent within a radius of 57 kilometers (approximately 35 miles) of the City of Sudbury Federal Building excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (6 employees in unit).

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

1146-83-R: Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, (Applicant) v. Seven-Up/Pure Spring Ottawa, A Division of Seven-Up Canada Inc., (Respondent) v. Seven-Up/Pure Spring Division Employees Association, (Intervener).

Unit: "all employees of the respondent at the City of Ottawa, save and except foremen and supervisors, persons above the rank of foreman and supervisor, and office and clerical staff." (191 employees in unit).

Number of names of persons on revised voters' list	159
Number of persons who cast ballots	158
Number of ballots excluding segregated ballots cast by persons whose name appear on voters' list	151
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	78
Number of ballots marked against applicant	72
Ballots segregated and not counted	7

2436-83-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Applicant) v. Sylra Ltd., operating as Crosstown Department Stores, (Respondent).

Unit #1: "all employees of the respondent at its retail outlets in Metropolitan Toronto, save and except managers, persons above the rank of manager, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (34 employees in unit).

Number of names of persons on revised voters' list		
Number of persons who cast ballots	33	
Number of ballots marked in favour of applicant		19
Number of ballots marked against applicant		11
Ballots segregated and not counted		3

Unit #2: "all employees of the respondent regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, at its retail outlets in Metropolitan Toronto save and except managers and persons above the rank of manager." (31 employees in unit).

Number of names of persons on revised voters' list		34
Number of persons who cast ballots	31	
Number of ballots marked in favour of applicant		19
Number of ballots marked against applicant		12

2536-83-R: Energy and Chemical Workers Union, CLC, (Applicant) v. Cadbury Schweppes Powell Limited, (Respondent) v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (U.A.W.), (Intervener #1) v. Milk and Bread Drivers, Dairy Employees Caterers and Allied Employees, Local Union No. 647, Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Intervener #2).

Unit: "all employees of the respondent at its chocolate confectionery operations at Whitby, Ontario, save and except Supervisors, persons above the rank of Supervisor, office staff, clerical and technical sales staff, and plant nurse." (332 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		328
Number of persons who cast ballots	292	
Number of ballots marked in favour of applicant		3
Number of ballots marked in favour of Intervener #1		169
Number of ballots marked in favour of Intervener #2		120

2584-83-R: International Union of Operating Engineers, Local 796, (Applicant) v. Ottawa-Carleton Regional Hospital Food Services, Inc., (Respondent).

Unit: "all employees of the respondent in Ottawa, Ontario, regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except office staff, graduate dietitians, student dietitians, supervisors, persons above the rank of supervisor and persons covered by a subsisting collective agreement." (12 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		9
Number of persons who cast ballots	8	
Number of ballots marked in favour of applicant		8
Number of ballots marked against applicant		0

2645-83-R: Service Employees Union, Local 204, (Applicant) v. Central Park Lodges, a division of Trizec Equities Ltd., (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, Ontario, regularly employed for not more than twenty-two and one-half (22-1/2) hours per week and students employed during the school vacation period, save and except all professional nursing staff, physiotherapists, occupational therapists,

supervisors, foremen, persons above the rank of supervisor and foreman, office staff and persons covered by subsisting collective agreements.” (110 employees in unit).

Number of names of persons on revised voters' list		117
Number of persons who cast ballots	41	
Number of ballots marked in favour of applicant		40
Number of ballots marked against applicant		1

Bargaining Agents Certified subsequent to a Post- Hearing Vote.

1907-83-R: Ontario Nurses' Association, (Applicant) v. International Medical Clinics (a division of Flight Medico Inc.), (Respondent).

Unit #1: (*See: Bargaining Agents Certified – No Vote Conducted*).

Unit #2: “all registered and graduate nurses employed in a nursing capacity by the respondent in Etobicoke, Ontario regularly employed for not more than 24 hours per week, save and except Nursing Co-ordinator and persons above the rank of Nursing Co-ordinator.” (10 employees in unit).

Number of names of persons on list as originally prepared		10
Number of persons who cast ballots	8	
Number of ballots marked in favour of applicant		7
Number of ballots marked against applicant		1

2223-83-R: International Union of Operating Engineers, Local 797, (Applicant) v. Kemptville District Hospital, (Respondent) v. Canadian Union of Operating Engineers & General Workers Local 111, (Intervener).

Unit: “all stationary engineers and persons engaged as their helpers employed by the respondent save and except chief engineers and those persons regularly employed for less than twenty-four (24) hours per week.” (2 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters'

2369-83-R: Service Employees Union, Local 204, Affiliated with S.E.I.U., A.F.L., C.I.O., C.L.C., (Applicant) v. The Greater Niagara General Hospital, (Respondent) v. Ontario Public Service Employees Union, (Intervener).

Unit: “all office and clerical employees of the respondent in Niagara Falls, Ontario regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, secretary to the: President, Vice-President, Medical Staff, Director of Finance, Director of Nursing, Department of Laboratories, Department of Radiology, Department of Psychiatry, all Personnel Department employees, payroll assistant, and persons covered by subsisting collective agreement.” (36 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		34
Number of persons who cast ballots	25	
Number of ballots marked in favour of applicant		19
Number of ballots marked against applicant		6

2465-83-R: Hotel Employees Restaurant Employees Union, Local 75, (Applicant) v. Villa Canale Hotel Inc., c.o.b. as Embassy Hotel, (Respondent).

Unit #1: (*See Bargaining Agents Certified – No Vote Conducted*).

Unit #2: “all employees of the respondent in Windsor regularly employed for not more than 24 hours per week and students employed during the school vacation period save and except supervisors, those

above the rank of supervisor, head chef, maitre 'd, sales and accounts staff." (5 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		6
Number of persons who cast ballots	6	
Number of ballots marked in favour of applicant		6
Number of ballots marked against applicant		0

2492-83-R: Retail, Wholesale and Department Store Union, AFL, CIO, CLC, (Applicant) v. Ontario Motor League Elgin-Norfolk Club and Ontario Motor League World Wide Travel Agency (St. Thomas) Ltd., (Respondent) v. Group of employees, (Objectors).

Unit: "all employees of the respondent at St. Thomas, Ontario, save and except office manager, persons above the rank of office manager, and head bookkeeper." (12 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		12
Number of persons who cast ballots	12	
Number of spoiled ballots		2
Number of ballots marked in favour of applicant		8
Number of ballots marked against applicant		2

Applications for Certification Dismissed – No Vote Conducted

1217-83-R: Canadian Union of Public Employees, (Applicant) v. The Corporation of the Town of Kenora, (Respondent) v. Local 559 of the International Brotherhood of Electrical Workers, (Intervener). (20 employees in unit).

2495-83-R: Service Employees International Union, (Applicant) v. Sanitation Economique Enr., (Respondent) v. Group of Employees, (Objectors). (10 employees in unit)

2521-83-R: United Brotherhood of Carpenters and Joiners of North America; Local 1988, (Applicant) v. Walker Insulating Ltd. (Respondent). (4 employees in unit).

2583-83-R: Seafarers' International Union of Canada, (Applicant) v. Seafarers' Training Institute, Institute De Formation Des Marins, (Respondent) v. Group of Employees, (Objectors). (22 employees in unit).

2733-83-R: United Steelworkers of America, (Applicant) v. Sala Machine Works Limited, (Respondent). (26 employees in unit).

2770-83-R: Ronald Knowles and Bill Parker (Applicant) v. United Textile Workers of America, (Respondent) v. Firestone Canada Ltd., (Intervener). .

Unit #1: (See: *Bargaining Agents Certified – No Vote Conducted*).

Unit #2: "all employees of the respondent at Thamesville regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except foremen, persons above the rank of foreman, and office and sales staff." (2 employees in unit). (*Having regard to the agreement of the parties*).

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

0814-83-R: Communications Workers of Canada, (Applicant) v. Consolidated Computer Inc., (Respondent).

Unit: "all employees of the respondent in the Regional Municipality of Ottawa-Carleton, save and except supervisors, persons above the rank of supervisor, office and sales staff." (134 employees in unit).

Number of names of persons on revised voters' list		134
Number of persons who cast ballots	119	
Number of ballots marked in favour of applicant		36
Number of ballots marked against applicant		75
Ballots segregated and not counted		8

2429-83-R: Energy and Chemical Workers Union, C.L.C., (Applicant) v. St. Mary's Cement Company, (Respondent) v. International Cement, Lime, Gypsum and Allied Workers International Union, A.F.L.-C.I.O.-C.L.C., (Intervener).

Unit: "all employees of the respondent at its plant at Bowmanville, save and except foremen, persons above the rank of foremen, office and sales and salaried technical staff." (88 employees in unit).

Number of names of persons on revised voters' list		88
Number of persons who cast ballots	87	
Number of ballots marked in favour of applicant		36
Number of ballots marked in favour of intervener		51

2527-83-R: United Electrical, Radio and Machine Workers of America, (UE), (Applicant) v. Thomson (Canada) Rivet Co. Limited, (Respondent) v. Thomson (Canada) Rivet Co. Limited Employees Association, (Intervener).

Unit: "all employees of the respondent in Gananoque save and except foremen, persons above the rank of foreman, office and sales staff." (67 employees in unit).

Number of names of persons on revised voters' list		67
Number of persons who cast ballots	67	
Number of ballots marked in favour of applicant		27
Number of ballots marked in favour of intervener		40

2713-83-R: Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, (Applicant) v. Pepsi-Cola Bottling Company (Toronto), (Respondent).

Unit: "all office staff of the respondent in Metropolitan Toronto and Whitby, Ontario save and except office manager, persons above the rank of office manager, confidential secretary to the vice-president and personnel, students employed during the school vacation period and employees covered by subsisting collective agreement." (34 employees in unit).

Number of names of persons on revised voters' list		32
Number of persons who cast ballots	31	
Number of spoiled ballots		1
Number of ballots marked in favour of applicant		9
Number of ballots marked against applicant		21

Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

1155-83-R: Labourers' International Union of North America, Local 1059, (Applicant) v. Pacheco's Contractors Ltd., (Respondent).

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent in all other sectors in the counties of Essex and Kent, the Counties of Oxford, Perth, Huron, Middlesex, Bruce, and Elgin, and the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township),

save and except non-working foremen and persons above the rank of non-working foreman.” (14 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		11
Number of persons who cast ballots	9	
Number of ballots marked in favour of applicant		0
Number of ballots marked against applicant		9

1752-83-R; 1757-83-R; 1758-83-R; 1759-83-R; 1760-83-R; 1761-83-R; 1795-83-R: International Union of Operating Engineers, Local 793, (Applicant) v. Smiths Construction Company Arnprior Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: “all employees of the respondent engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, truck drivers and labourers, save and except foremen and persons above the rank of foreman, students employed during the school vacation period and employees employed in the industrial, commercial and institutional sector of the construction industry.” (84 employees in unit).

Number of names of persons on list as originally prepared		116
Number of persons who cast ballots	91	
Number of ballots marked in favour of applicant		31
Number of ballots marked against applicant		60

2411-83-R: United Steelworkers of America, (Applicant) v. Aluminart Products Limited, Extrusion Division, (Respondent) v. Group of Employees, (Objectors).

Unit: “all employees of the respondent in the town of Halton Hills, save and except foremen, persons above the rank of foreman, office and sales staff.” (39 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		29
Number of ballots excluding segregated ballots cast by persons whose name appear on voters' list	27	
Number of spoiled ballots		2
Number of ballots marked in favour of applicant		9
Number of ballots marked against applicant		16
Ballots segregated and not counted		1

2528-83-R: United Steelworkers of America, (Applicant) v. 354131 Ontario Limited M & M Mechanical & Electrical Specialties, (Respondent).

Unit: “all employees of the respondent in the City of Guelph, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week, and students employed during the school vacation period.” (50 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		49
Number of persons who cast ballots	47	
Number of ballots marked in favour of applicant		16
Number of ballots marked against applicant		31

2531-83-R: Textile, Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351, (Applicant) v. Creeds Storage Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (51 employees in unit). (*Having regard to the agreement of the parties*).

Number of persons on revised voters' list		42
Number of persons who cast ballots	43	
Number of ballots marked in favour of applicant		15
Number of ballots marked against applicant		26
Ballots segregated and not counted		2

2643-83-R: International Molders & Allied Workers Union, (Applicant) v. Elgin Handles Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at St. Thomas, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, and students employed during the school vacation period." (74 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		73
Number of persons who cast ballots	72	
Number of spoiled ballots		1
Number of ballots marked in favour of applicant		34
Number of ballots marked against applicant		37

APPLICATIONS FOR CERTIFICATION WITHDRAWN

1607-83-R: United Brotherhood of Carpenters and Joiners of America Local 2466, (Applicant) v. Vie-Bilt General Contractors Inc., (Respondent).

2563-83-R: Canadian Union of Public Employees, (Applicant) v. The Metropolitan General Hospital, (Respondent).

2595-83-R: Laundry and Linen Drivers and Industrial Workers Union, Teamsters Local 847, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Economic Laboratory, (Respondent).

2621-83-R: United Steelworkers of America, (Applicant) v. Commonwealth Heat-Treating Limited, (Respondent) v. Group of Employees, (Objectors).

2626-83-R: Retail, Wholesale and Department Store Union, AFL, CIO, CLC, (Applicant) v. Reitzel Bros. Limited, (Respondent) v. Group of Employees, (Objectors).

2671-83-R: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Ellis-Don Limited, (Respondent).

2690-83-R: International Brotherhood of Painters and Allied Trades - Local Union 557, (Applicant) v. The Toronto-Dominion Bank, (Respondent).

2744-83-R: United Brotherhood of Carpenters and Joiners of America, (Applicant) v. C. D. C. Forming, (Respondent).

2795-83-R: Hotel Employees Restaurant Employees Union, Local 75, (Applicant) v. Austrian Club (Edelweiss) Inc., (Respondent).

2865-83-R: The Canadian Union of Public Employees, (Applicant) v. St. Joseph's Health Centre (Toronto), (Respondent) v. Service Employees Union, Local 204, (Intervener).

2875-83-R: United Steelworkers of America, (Applicant) v. Sala Machine Works Ltd., (Respondent).

2922-83-R: Labourers' International Union of North America, Local 183, (Applicant) v. E. & R. Carpenters Inc., (Respondent) v. Local 1190, United Brotherhood of Carpenters and Joiners of America, (Intervener).

2956-83-R: The United Brotherhood of Carpenters' & Joiners of America, (Applicant) v. Big H. Construction Limited, (Respondent).

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

1621-83-R: United Brotherhood of Carpenters and Joiners of America, Local 2486, (Applicant) v. Lavern Construction Co. Ltd. and 506162 Ontario Ltd., carrying on business as LCM Developments Ltd., (Respondents). (*Granted*).

1738-83-R: Ontario Sheet Metal Workers Conference Sheet Metal Workers International Association, Local 269, (Applicants) v. Gerald Davidson Plumbing & Heating Limited 419227 Ontario Limited, (Respondents) v. Group of Employees, (Objectors). (*Dismissed*).

2041-83-R: International Brotherhood of Boilermakers' Local Union 128, (Applicant) v. Vacuum Anchor Corporation, VAC Services, Division of 464555 Ontario Limited, (Respondents). (*Granted*).

2325-83-R: United Brotherhood of Carpenters and Joiners of America, Local 2041, (Applicant) v. Denis Construction Reg'd., and Withwood Construction Ltd., (Respondents). (*Granted*).

2422-83-R: Service Employees Union, Local 204, (Applicant) v. Quotient Management Services Limited and 464852 Ontario Limited, (Respondent) v. 484030 Ontario Limited, (Intervener). (*Withdrawn*).

2548-83-R: Sheet Metal Workers' International Association, Local Union 47, (Applicant) v. Forced Air Comfort Limited, J.W. Heating Limited and 519822 Ontario Inc., (Respondents). (*Terminated*).

2609-83-R: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Willem Terlouw, Terlouw Management Services, Melford Design Inc., (Respondents). (*Granted*).

2642-83-R: United Steelworkers of America, (Applicant) v. Nightingale Industries Limited, Nightingale Interloc Limited, and Employers Overload Company, EOC of Canada Ltd., (Respondents). (*Dismissed*).

2709-83-R: Retail, Wholesale and Department Store Union, AFL, CIO, CLC, (Applicant) v. Ontario Motor League Elgin-Norfolk Club and World Wide Travel Agency (St. Thomas) Ltd., (Respondent). (*Withdrawn*).

2809-83-R: The United Brotherhood of Carpenters and Joiners of America, Local 1030, (Applicant) v. Steenbakkens Lumber Co. Ltd. and Capital Roof Truss Ltd., (Respondents). (*Withdrawn*).

SALE OF A BUSINESS

1896-83-R: The Built-Up Roofers' Damp and Waterproofers' Section of the Ontario Sheet Metal Workers Conference of the Sheet Metal Workers' International Association and Sheet Metal Workers' International Association, Local 62, (Applicants) v. Conestoga Roofing & Sheet Metal Ltd., Galt Roofing

and Sheet Metal (Ontario) Limited and Walden Roofing & Sheet Metal Co. Limited. (Respondents) v. 524442 Ontario Inc., (Intervener). (*Withdrawn*).

1994-83-R: Service Employees Union, Local 204, A.F.L., C.I.O., C.L.C., (Applicant) v. 484030 Ontario Limited and Quotient Management Services Limited, (Respondent). (*Withdrawn*).

2042-83-R: International Brotherhood of Boilermakers' Local Union 128, (Applicant) v. Vacuum Anchor Corporation, VAC Services, Division of 464555 Ontario Limited, (Respondents). (*Dismissed*).

2454-83-R: International Brotherhood of Painters and Allied Trades and The Ontario Council of The International Brotherhood of Painters and Allied Trades and International Brotherhood of Painters and Allied Trades, Local 1824, (Applicant) v. Pilkington Glass Centre, Division of Ford Glass Limited and Haroun Glass Centre Inc., (Respondents). (*Withdrawn*).

2549-83-R: Sheet Metal Workers' International Association, Local Union 47, (Applicant) v. Forced Air Comfort Limited, J.W. Heating Limited and 519822 Ontario Inc., (Respondents). (*Terminated*).

UNION SUCCESSOR RIGHTS

1418-83-R: United Food and Commercial Workers Union, (Applicant) v. Waterloo Spinning Mills Ltd., (Respondent). (*Granted*).

1419-83-R: United Food and Commercial Workers Union, (Applicant) v. Strudex Fibres Ltd., (Respondent). (*Granted*).

1420-83-R: United Food and Commercial Workers Union, (Applicant) v. Chrome Print, (Respondent). (*Granted*).

1421-83-R: United Food and Commercial Workers Union, (Applicant) v. Kraus Carpet Mills Ltd., (Respondent). (*Granted*).

1422-83-R: United Food & Commercial Workers Union, AFL-CIO-CLC, (Respondent). (*Granted*).

2730-83-R: United Steelworkers of America, (Applicant) v. Alcan Canada Products Limited. (Muskoka Works), (Respondent). (*Granted*).

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

2338-82-R: Grant Drew, Steve Crowe, Fred Downer and Mel Davis, (Applicants) v. International Union of Bricklayers and Allied Craftsmen Local #17, (Respondent) v. Stuart Riel Masonry Contractor, (Intervener). (4 employees in unit). (*Dismissed*).

2269-83-R: Tileta Hyatt, (Applicant) v. United Steelworkers of America, Local 7978, (Respondent) v. Allan Windows, (Intervener).

Unit: "all employees of Allan Windows at Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period." (16 employees in unit). (*Granted*).

Number of names of persons on revised voters' list		24
Number of persons who cast ballots	21	
Number of ballots marked in favour of respondent		8
Number of ballots marked against respondent		13

2270-83-R: Ronald Knowles and Bill Parker, (Applicant) v. United Textile Workers of America, (Respondent) v. Firestone Canada Ltd., (Intervener).

Unit: "all employees of the respondent employed at its Retail Store in Woodstock Ontario save and except Store Manager, Service Manager, Office and Credit Manager, Sales Persons, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (4 employees in unit). (*Granted*).

Number of names of persons on voters' list		3
Number of persons who cast ballots	3	
Number of ballots marked in favour of respondent		0
Number of ballots marked against respondent		3

2357-83-R: David Croutch, (Applicant) v. International Union of Operating Engineers, Local No. 796, (Respondent) v. The Atrium on Bay, (Intervener).

Unit: "all of the employees of Bay Street Atria Limited in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (9 employees in unit). (*Granted*).

Number of names of persons on revised voters' list		10
Number of persons who cast ballots	8	
Number of ballots marked in favour of respondent		0
Number of ballots marked against respondent		8

2561-83-R: Anton Fluri, (Applicant) v. Hotel, Restaurant and Cafeteria Employees Union, Local 75, (Respondent).

Unit: "all employees of the employer in the City of St. Catherines, save and except managers, persons above the rank of manager, persons regularly employed for not more than twenty-four (24) hours per week, and students employed during the school vacation period; and all employees of the employer regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (22 employees in unit). (*Granted*).

2938-83-R: Ronald Dick, (Applicant) v. O. Browne & Co. Ltd., (Respondent). (14 employees in unit). (*Withdrawn*).

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE (CONSTRUCTION INDUSTRY)

2937-83-U: Fifeness Construction Ltd., (Applicant) v. The Toronto Central Ontario Building and Construction Trades Council, David Johnson, John Kurchak and Quinto Ceolin, (Respondents) v. Cimor Forming Limited and Midview Construction Limited, (Interveners). (*Granted*).

APPLICATIONS FOR DECLARATION OF UNLAWFUL LOCKOUT

2723-83-U: The United Brotherhood of Carpenters and Joiners of America, Local 1030, (Applicant) v. Steenbakkens Lumber Co. Ltd. and/or Capital Roof Truss 1984 Ltd., (Respondent). (*Withdrawn*).

2726-83-U: The United Brotherhood of Carpenters and Joiners of America, Local 1030, (Applicant) v. Steenbakkens Lumber Co. Ltd. and/or Capital Roof Truss 1984 Ltd., (Respondent). (*Withdrawn*).

COMPLAINTS OF UNFAIR LABOUR PRACTICE

1869-82-U: Rafael Nunez, (Complainant) v. Toronto Musicians' Association Local 149 American Federation of Musicians, (Respondent). (*Dismissed*).

0290-83-U: International Woodworkers of America, Local 2-69, (Complainant) v. Consolidated Bathurst Packaging Ltd., (Respondent). (*Dismissed*).

0322-83-U: John (Jack) James, (Complainant) v. Labourers' International Union of North America, and its Locals 493 and 527, (Respondents). (*Dismissed*).

0421-83-U: Labourers' International Union of North America, Local 183, (Complainant) v. Heath Development Corporation, carrying on business as Heath Residences and Harry Birman carrying on business as Cando Property Management, (Respondents). (*Dismissed*).

0773-83-U: John D. R. Weed, (Complainant) v. #419 Teamsters Local Union, (Respondent). (*Withdrawn*).

0943-83-U: Hotel Employees & Restaurant Employees Union, Local 75, (Complainant) v. Elias Brothers Restaurants, Inc. carrying on business as Big Boy Restaurants, (Respondent). (*Granted*).

1139-83-U; 1140-83-U; 1300-83-U: Union of Labour Representatives of Ontario, (Complainant) v. Mooney's Bay T.V. and Stereo Ltd., (Respondent). (*Withdrawn*).

1309-83-U: Schneiders Office Employees Association, (Complainant) v. J. M. Schneider Inc. and Link Services Inc., (Respondents). (*Granted*).

1466-83-U: Allen Steckly, (Complainant) v. Kraus Carpet Employees Association, (Respondent). (*Dismissed*).

1663-83-U: Vukota Vujicic, (Complainant) v. The Schneider Employees Association, and J. M. Schneider Inc., (Respondents). (*Granted*).

1675-83-U: Windsor Grain Processor's Union, (Complainant) v. Maple Leaf Monarch Company, (Respondent). (*Dismissed*).

1682-83-U: Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, (Applicant) v. Seven-Up/Pure Spring Ottawa, A Division of Seven-Up Canada Inc., (Respondent) v. Seven-Up/Pure Spring Division Employees Association, (Intervener). (*Granted*).

1762-83-U: Fur, Leather, Shoe & Allied Workers' Union, Local 82 Affiliated with the United Food & Commercial Workers International Union AFL-CIO, (Complainant) v. Peter Makos Furs Limited, (Respondent). (*Terminated*).

1802-83-U: Labourers' International Union of North America, Local 1059, (Complainant) v. Pacheco's Contractors Ltd., (Respondent). (*Dismissed*).

2043-83-U: International Brotherhood of Boilermakers' Local Union 128, (Applicant) v. Vacuum Anchor Corporation, VAC Services, Division of 464555 Ontario Limited, (Respondent). (*Dismissed*).

2045-83-U: Ontario Public Service Employees Union, (Complainant) v. Danver Ambulance Service Inc., (Respondent). (*Withdrawn*).

2221-83-U: International Union of Electrical, Radio and Machine Workers, (Complainant) v. Precious Plate Ltd., (Respondent). (*Withdrawn*).

2256-83-U: International Union of Electrical, Radio and Machine Workers, (Complainant) v. Precious Plate Ltd., (Respondent). (*Withdrawn*).

2285-83-U: Ontario Nurses' Association, (Complainant) v. Brantwood Manor Nursing Home Limited, (Respondent). (*Granted*).

2326-83-U: United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W., (Complainant) v. Central Consolidated Holdings Limited in its Coulter Radiator Division and Carleton Radiator Division, (Respondent). (*Dismissed*).

2343-83-U: United Steelworkers of America, (Complainant) v. York Barbell Co. Ltd., (Respondent). (*Withdrawn*).

2348-83-U: Knud Kristian Kaerbye, (Complainant) v. Gisar Contracting Limited and George Villeneuve, (Respondents). (*Withdrawn*).

2402-83-U: The Canadian Union of Public Employees and its Local 210, (Complainant) v. The Corporation of the City of Timmins et al, (Respondent). (*Withdrawn*).

2452-83-U; 2453-83-U: Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, (Complainant) v. Ontario Liquor Boards Employees' Union, (Respondent). (*Withdrawn*).

2466-83-U: Canadian Union of Public Employees and its Local Union 1140, (Complainant) v. City of Timmins Home for the Aged (Golden Manor) – Maureen Racicot et al, (Respondents) v. Northern College of Applied Arts and Technology, (Intervener). (*Withdrawn*).

2498-83-U: Labourers' International Union of North America, Local 183, (Complainant) v. Curtis Property Management Ltd., (Respondent). (*Dismissed*).

2522-83-U: Melvin MacAskill, (Complainant) v. Local 397, U.A.W., C.L.C., (Respondent). (*Withdrawn*).

2543-83-U: Richard Patenaude, (Complainant) v. Gisar Contracting Limited, George Villeneuve and Armand Noel, (Respondent). (*Withdrawn*).

2546-83-U: Maria DiBattista, (Complainant) v. United Steelworkers of America, (Respondent). (*Withdrawn*).

2551-83-U: Ontario Nurses' Association, (Complainant) v. Heritage Nursing Home Limited, (Respondent). (*Withdrawn*).

2556-83-U: Francisco da Silva, (Complainant) v. Labourers' International Union of North America, (Local 506), (Respondent). (*Withdrawn*).

2557-83-U: Graphic Communications International Union, Local 500-M, (Complainant) v. Intercheques (A Division of Cairn Capital Inc.), (Respondent). (*Withdrawn*).

2572-83-U: Laurel Rodney, (Complainant) v. Sunnybrook Hospital Employees Union, Local 777, (Respondent) v. Sunnybrook Hospital, (Intervener). (*Dismissed*).

2573-83-U: Larry J. Grant, (Complainant) v. Local 4657 United Steelworkers, (Respondent). (*Dismissed*).

2579-83-U: Sarla Mehta, (Complainant) v. Hotel Employees Restaurants Union Local 75, (Respondent). (*Withdrawn*).

2590-83-U: International Woodworkers of America, (Complainant) v. John Krautwurst Furniture Limited and Rebu'h Furniture (1983) Inc., (Respondents). (*Granted*).

2603-83-U: United Electrical, Radio and Machine Workers of America (UE), (Complainant) v. Guelph Tool & Die Limited, (Respondent). (*Withdrawn*).

2605-83-U: Local 280 Bartenders' & Beverage Dispensers' of H.E.R.E., International Union, (Complainant) v. West Hill Tavern, (Respondent). (*Withdrawn*).

2614-83-U: Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, (Complainants) v. Ontario Liquor Boards Employees' Union, (Respondent). (*Withdrawn*).

2622-83-U: International Union, United Automobile, Aerospace & Agricultural Implement Workers, (Complainant) v. Allen Industries Canada (A Division of Dayco Canada) Ltd., (Respondent). (*Withdrawn*).

2637-83-U: Labourers' International Union of North America, Local 183, on its own behalf of its members, (Complainant) v. Toronto-Central Ontario Building and Construction Trades Council, (Respondent) v. The Carpenters' District Council of Toronto and Vicinity, United Brotherhood of Carpenters and Joiners of America on behalf of Local Union 27, (Intervener). (*Withdrawn*).

2639-83-U: Bridget T. Benjamin, (Complainant) v. Local 1156 The Canadian Union of Public Employees, (Respondent). (*Withdrawn*).

2654-83-U: United Steelworkers of America, (Complainant) v. Jensen Steel, (Respondent). (*Withdrawn*).

2660-83-U: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W., (Complainant) v. Judricks Enterprises Limited, (Respondent). (*Withdrawn*).

2662-83-U: Stephen Poisson, (Complainant) v. The International Association of Bridge, Structural and Ornamental Ironworkers Local Union 700, F. Marr, H. Ellihan, J. Harrower, A. Sanderson, T. Murphy, R. Larue, R. Simpson, B. Logan, G. Michaluk, (Respondents). (*Withdrawn*).

2663-83-U: Philip Bufalino, (Complainant) v. International Harvester Canada Limited and U.S.W.A. Local 2868, (Respondents). (*Dismissed*).

2664-83-U: Joseph Harte, (Complainant) v. Steel Company of Canada and United Steel Workers of America, Local 1005, (Respondents). (*Withdrawn*).

2675-83-U; 2676-83-U: Retail, Wholesale and Department Store Union, AFL, CIO, CLC, (Complainant) v. Sunrise Records, (Respondent). (*Withdrawn*).

2677-83-U: Hotel Employees Restaurant Employees Union, Local 75, (Complainant) v. 470469 Ontario Limited, (Respondent). (*Withdrawn*).

2678-83-U: John Lethbridge, (Complainant) v. Butler Mfg. and Local 6791, U.S.W.A., (Respondent). (*Withdrawn*).

2679-83-U: The Ontario Liquor Boards Employees' Union, (Complainant) v. The Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, (Respondent). (*Withdrawn*).

2681-83-U: Reuben Johnson, (Complainant) v. United Electrical, Radio and Machine Workers of America, Union Local 507, (Respondent). (*Withdrawn*).

2711-83-U: Health, Office & Professional Employees, a division of Local 206, Retail Commercial & Industrial Union, chartered by the United Food & Commercial Workers International Union, C.L.C., A.F.L., C.I.O., (Complainant) v. Marsdale Manor Nursing Home owned and operated by Versa-Care Ltd., (Respondent). (*Withdrawn*).

2725-83-U: The United Brotherhood of Carpenters and Joiners of America, Local 1030, (Complainant) v. Steenbakkens Lumber Co. Ltd. and/or Capital Roof Truss 1984 Ltd., (Respondent). (*Withdrawn*).

2729-83-U: Teamsters Local Union No. 49, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. Burgess Wholesale (1978) Limited, (Respondent). (*Withdrawn*).

2736-83-U: Catherine Majorie Howden, (Complainant) v. Local 5141 U.S.W.A., (Respondent). (*Withdrawn*).

2738-83-U; 2739-83-U: Retail, Wholesale and Department Store Union AFL-CIO-CLC, (Complainant) v. Marsh Frozen Foods Limited, (Respondent). (*Withdrawn*).

2741-83-U: The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 508, on its own behalf and on behalf of its members, (Complainant) v. 556631 c.o.b. as G.P. Construction, (Respondent). (*Withdrawn*).

2743-83-U: Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, (Complainant) v. Seven-Up/Pure Spring Ottawa, (Respondent). (*Withdrawn*).

2745-83-U: Ontario Public Service Employees Union, (Complainant) v. Seneca College of Applied Arts and Technology and Cleaning Services Limited, (Respondents). (*Withdrawn*).

2748-83-U; 2749-83-U: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W., (Complainant) v. Central Consolidated Holdings Limited in its Coulter Radiator Division and Carleton Radiator Division, (Respondent). (*Withdrawn*).

2756-83-U: International Brotherhood of Electrical Workers, Local 636, (Complainant) v. The Corporation of the Town of Milton, (Respondent). (*Withdrawn*).

2759-83-U: Barry Joseph Fitzgerald, (Complainant) v. Independant Canadian Steelworkers Union, Vince Vocal, President, (Respondent). (*Withdrawn*).

2762-83-U; 2763-83-U; 2764-83-U: United Food & Commercial Workers International Union, (Complainant) v. Quinte Beach Nursing Home, (Respondent). (*Withdrawn*).

2820-83-U: Edward Michael Staunton, Vice-President of Local 456 U.A.W. Holmes Foundry Unit, (Complainant) v. Holmes Foundry Ltd., 200 Exmouth Street, Sarnia, (Respondent). (*Withdrawn*).

2823-83-U: Raoul Milette and Jim Jakomat, (Complainant) v. Phase Four Electrical Contractor, (Respondent). (*Withdrawn*).

2835-83-U: Health Office & Professional Employees a division of Local 206 United Food & Commercial Workers International Union, (Complainant) v. Quinte Beach Nursing Home, (Respondent). (*Withdrawn*).

2905-83-U: Steve Bovchuk, (Complainant) v. Labourers International Union of North America, Local 1607, Thunder Bay, (Respondent). (*Withdrawn*).

2921-83-U: Schneiders Office Employees Association, (Complainant) v. J. M. Schneider Inc. and Link Services Inc., (Respondents). (*Withdrawn*).

2927-83-U: Hotels, Clubs, Restaurants & Tavern Employees' Union, Local 261, (Complainant) v. Rehman Zia, Manager, Suisha Gardens, (Respondent). (*Withdrawn*).

2931-83-U: C. B. Edwards, W. Shepherd, M. Galipeau, W. Gross representing 63 petitioners, (Complainant) v. C.U.P.E. Local 16 Executive & Union Representative, (Respondent). (*Withdrawn*).

2936-83-U: The Employees of Renown Printing Co. Ltd., Belonging to the Niagara Peninsula Printing & Graphic Communications Union, Local 425, (Complainant) v. Henry Poleska, Shop Steward and President of/and The Niagara Peninsula Printing & Graphic Communications Union, Local 425, (Respondent). (*Withdrawn*).

APPLICATIONS FOR CONSENT TO PROSECUTE

1895-83-U: International Union of Operating Engineers, Local 793, (Applicant) v. Andrew Paving & Engineering Ltd., (Respondent). (*Withdrawn*).

2623-83-U: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (U.A.W.), and its Local 397, (Applicant) v. Hussmann Store Equipment Limited and Ray Hawley, (Respondents). (*Dismissed*).

2724-83-U: The United Brotherhood of Carpenters and Joiners of America, Local 1030, (Applicant) v. Steenbakkens Lumber Co. Ltd. and/or Capital Roof Truss 1984 Ltd., (Respondent). (*Withdrawn*).

2740-83-U: Retail, Wholesale and Department Store Union, AFL, CIO, CLC, (Applicant) v. Marsh Frozen Foods Limited, (Respondent). (*Withdrawn*).

APPLICATIONS FOR RELIGIOUS EXEMPTION

2504-83-M: Daniel Kislenko, (Applicant) v. Southern Ontario Newspaper Guild, Local 87, (Respondent Trade Union) v. The Spectator, (Respondent Employer). (*Granted*).

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

2616-83-M: Falconbridge Limited, (Employer) v. Canadian Guards Association, Local 107, (Trade Union). (*Granted*).

2667-83-M: Falconbridge Limited, (Employer) v. Sudbury Mine, Mill & Smelters Workers' Union, Local 598, (Trade Union). (*Granted*).

2680-83-M: United Tire & Rubber Co. Limited, (Employer) v. Local 687, United Rubber, Cork, Linoleum and Plastic Workers of America, (Trade Union). (*Granted*).

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*Ontario Labour Relations Board,
400 University Avenue,
Toronto, Ontario*

ISSN 0383-4778



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**A Monthly Series of Decisions from the
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Cited [1984] OLRB REP. MAY

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Typeset, Printed and Bound by Union Labour in Ontario

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2656-83-R Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Applicant, v. **Brock Milk Transport Limited**, Respondent

Bargaining Unit – Practice and Procedure – Employer business of pick-up and delivery of milk – Truck drivers keeping company truck at home and working out of home – Drivers living in different municipalities within regional municipalities of Durham and York – Milk pick-ups, manager’s residence and pay-cheque pick-ups in same area – Unit described in terms “in and out of regional municipalities of Durham and York” in unique circumstances

BEFORE: Ian C. Springate, Vice-Chairman, and Board Members J. A. Ronson and B. K. Lee.

APPEARANCES: *Eric del Junco, John Malcolm and John Kerrigan for the applicant; J. C. Murray and R. M. Wood for the respondent.*

DECISION OF THE BOARD; May 3, 1984

1. The name of the respondent is amended to read: “Brock Milk Transport Limited”.
2. This is an application for certification.
3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
4. The parties disagree on the geographic description of the appropriate bargaining unit, and as to whether or not the Board should follow its general practice in describing bargaining units. Apart from the construction industry, the Board’s general practice is to describe a bargaining unit by reference to the municipality in which the affected employees are employed. Further, with the exception of Metropolitan Toronto (where the Board treats the Municipality of Metropolitan Toronto as a single municipal unit) the Board generally makes reference to a local municipality, be it a city, town, village or municipal township, and not the regional municipality, county or district of which it forms a part. See: *Wix Corporation Limited* [1975] OLRB Rep. Aug. 638 and *Fotomat Canada Limited* [1979] OLRB Rep. April 306. From time to time, however, the circumstances of a particular case have caused the Board to depart from this general practice and to describe a bargaining unit so as to encompass more than just one local municipality. See, for example, *Board of Health of the York-Oshawa District Health Unit* [1969] OLRB Rep. June 340 and *Dynamic Closures Limited* [1983] OLRB Rep. April 521.
5. The respondent has a licence from the Ontario Milk Marketing Board to pick up and deliver milk. There are five employees for whom the union seeks bargaining rights, all of whom are employed by the respondent as truck drivers. Indications are that these drivers pick up milk within the Regional Municipalities of York and Durham. Both of these Regional Municipalities are comprised of a number of towns and townships, some of which are fairly extensive in area and themselves encompass a number of different communities. The milk is generally delivered to locations within Metropolitan Toronto, although deliveries have also been

made within the cities of Mississauga and Brampton, both being municipalities within the Regional Municipality of Peel, as well as the Community of Georgetown in the Town of Halton Hills in the Regional Municipality of Halton and the City of Guelph in the County of Wellington.

6. Mr. R. M. Wood was described at the hearing as the owner of the respondent. Mr. Wood, who resides in the City of Cambridge in the Regional Municipality of Waterloo, uses his home as his office. So as to directly oversee the employees affected by this certification application, the respondent employs a manager who also works out of his home. The manager lives in the community of Stouffville, which is part of the Town of Whitchurch-Stouffville, itself one of the area municipalities comprising the Regional Municipality of York. Across the street from the manager's home is a garage owned by a certain Mr. Wilson. Mr. Wilson is not employed by the respondent. Mr. Wilson does, however, service the trucks owned by the company. Further, the respondent has an understanding with Mr. Wilson whereby milk samples are left at his garage to be picked up by the Milk Marketing Board. Pay cheques for the company's drivers are also left at the garage for them to pick up.

7. Further complicating the geographic issue is the fact that each of the five drivers employed by the respondent essentially works from his home, with a company truck being kept at each of their homes. The drivers live in a number of different municipalities. Two of them reside in or close to Uxbridge, which is a community within the Municipal Township of Uxbridge. This township is in turn part of the Regional Municipality of Durham. Another driver resides in the community of Sunderland in the Municipal Township of Brock, which is also part of the Regional Municipality of Durham. The remaining two drivers reside in the Regional Municipality of York. One lives at Locust Hill, which is within the municipal boundaries of the Town of Markham, while the other lives at Stouffville in the Town of Whitchurch-Stouffville.

8. The applicant trade union originally proposed that the bargaining unit be described in terms of employees working at or out of Cambridge, which is where the respondent's owner lives. At the hearing, however, the applicant acknowledged that this was not an appropriate description and proposed that the unit be described so as to encompass all of the Regional Municipalities and the one county where the drivers pick up and deliver milk, as well as the Regional Municipality of which Cambridge forms a part. Such a unit would be described in terms of the Municipality of Metropolitan Toronto, the Regional Municipalities of Durham, York, Peel, Halton and Waterloo and the County of Wellington. The respondent, however, takes a different position. The respondent's first position is that the facts of this case are analogous to those in the *Fotomat* case, and the Board should follow its normal policy as outlined in that case and describe the bargaining unit by reference to a local municipality. The respondent notes that two employees reside in the Municipal Township of Uxbridge, and submits that these two employees would constitute an appropriate bargaining unit. The respondent contends that the Municipal Township of Brock, the Town of Markham and the Town of Whitchurch-Stouffville would, apart from the requirements of section 6(1) of the Act, likewise be the appropriate geographic limits for three additional bargaining units. Section 6(1) provides that a bargaining unit must have more than one employee. Given this requirement and the fact that only one employee lives in each of these three municipalities, the respondent contends that the three employees in question do not come within any appropriate bargaining unit. In the alternative, the respondent submits that there should be two separate units, one comprised

of the two employees living in the Regional Municipality of York and the other comprised of the three employees living in the Regional Municipality of Durham.

9. Given the rather unique facts of this case, we do not believe that the employees should be divided into separate bargaining units, whether by reference to local or regional municipalities. Although the drivers live in separate municipalities, a glance at a map indicates that they all live within an area comprised of the Regional Municipality of Durham and the eastern part of the Regional Municipality of York. Presumably all or most of their milk pick-ups are made within the same general area. All of the drivers are managed by a single manager who works out of his home in the area, and all of them pick up their pay cheques and get their trucks serviced at Wilson's garage located across the street from the manager. It is apparent that this is not a case where the respondent is carrying on separate operations in different municipalities. Rather, it is carrying on a single operation which basically covers a number of local municipalities located in the Regional Municipalities of York and Durham. In our view, the most reasonable approach would be to include all of the employees engaged in this operation within a single bargaining unit.

10. In reaching this decision we have concluded that the facts of this case differ in many respects from those in the *Fotomat* case. In *Fotomat* the employer operated small kiosks in a number of municipalities spread throughout Ontario. In some of these municipalities, there was only one kiosk with two employees, whereas in others, most notably Metropolitan Toronto, there were a large number of kiosks and a substantial number of employees. While employees were frequently transferred between kiosks in the same municipality, they were seldom transferred between municipalities. The respondent in that case contended that there should be a single bargaining unit encompassing all of its employees in its Toronto administrative area. This area encompassed a large part of Southern Ontario, and the proposed bargaining unit would have included some 230 employees working in 22 different municipalities, some as distant from Toronto as Lindsay, Barrie and Belleville. The applicant, however, sought to be certified on a municipal basis for several separate units, including one unit in Metropolitan Toronto. The Board accepted the applicant's proposed units. In doing so, the Board expressed its concern that if it were to accept the respondent's position, it would mean that the right of employees in a number of communities, including Metropolitan Toronto, to be represented by a union would depend on the desires of employees in a host of other cities and towns. As already noted, these other communities were spread out over a rather large area. In our view, these considerations do not apply in the instant case. Here there are only five employees involved. Further, although these employees live in different municipalities they all reside within the same general area, and are all part of the same operation.

11. Although we have rejected the respondent's proposals with respect to the proposed bargaining unit, we are not prepared to accept the very broad unit description proposed by the applicant. We are of the view that all of the respondent's existing operation, and any likely expansion of that operation, should come within the bargaining unit. However, we do not believe the unit should be so extensive that it would include any new operations which the respondent might commence in an entirely separate labour market. To describe the unit as broadly as the applicant requests might well produce such a result. Accordingly, we are of the view that a more limited description would be appropriate. Given all the circumstances, we believe the most reasonable approach would be to describe the unit so as to encompass employees working in and out of the Regional Municipalities of Durham and York.

12. Having regard to the above conclusion, and to the agreement of the parties with respect to all other matters relevant to the description of the bargaining unit, the Board finds that all employees of the respondent working in and out of the Regional Municipalities of York and Durham, save and except supervisors, persons above the rank of supervisor and persons regularly employed for not more than 24 hours per week, constitute a unit of employees appropriate for collective bargaining.

13. The applicant filed evidence of membership on behalf of three of the five employees in the bargaining unit. The membership evidence takes the form of "cards", each of which consists of an application for membership and an attached receipt. Each of the cards is signed by an employee, and in every case the receipt indicates that the employee has paid a dollar to the union within the six month period prior to the terminal date. The evidence of membership is supported by a duly completed Form 9, Declaration Concerning Membership Evidence.

14. In all the circumstances, the Board is satisfied that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on March 5, 1984, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

15. A certificate will issue to the applicant.

0850-83-U Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 597, Complainant, v. **C. E. Lummus Canada Ltd.**, Respondent, v. Labour Relations Bureau of the Ontario General Contractors Association, Intervener

Damages - Lock-out - Remedies - Prior decision finding denial of ninth-hour of work lock-out - Fact that unlawfulness "close call" not reason to deny lost wages - Employer arguing no loss since hours denied to grievors worked by other members - Board finding damages payable where identifiable individuals denied work unlawfully - Double payment unavoidable result of unlawful conduct

BEFORE: M. G. Mitchnick, Vice-Chairman, and Board Members J. Wilson and C. A. Ballentine.

APPEARANCES: *David Strang, Bill Fairservice and Don Little for the complainant; R. C. Fillion, E. Amos, K. Pierce and T. Ervin for the respondent; Bruce Binning and Jim Thomson for the intervener.*

DECISION OF THE BOARD; May 11, 1984

1. This is the continuation of a complaint under section 89 of the *Labour Relations*

Act, in which the Board, in its decision of October 18, 1983, [now reported at [1983] OLRB Rep. Oct. 1688] found that the respondent had locked out the 47 individual grievors contrary to the provisions of section 72 and 75 of the *Act*. The Board then found that damages would flow to the complainant's members as a result, and remained seized in the event the parties were unable to settle on the amount owing. The parties have not so settled, and a further hearing took place to entertain the evidence and representations of the parties on this issue.

2. The critical portion of the October 17th decision read as follows:

16. ... Lummus states that it at all times was prepared to live with the possibility of the Labourers refusing to work the extended 4-day hours. Whether it did in fact live with that situation within the work-assignment provisions of its collective agreement would only be determined by litigation of the Labourers' grievance. But whether or not Lummus was prepared to live with that eventuality, it was patently to its advantage to bring as many of the trades as possible into line with its Pipefitter arrangement, and in drafting its Notice of June 30th, it clearly had decided to pursue that end. The Notice began, once again:

Effective July 4, 1983, this job site will be scheduled for a four (4) day work week. Pipefitters, insulators, sheet metal workers, boiler-makers and painters will be working extended hours on the 4 days to complete a standard work week in accordance with our agreement. Other crafts will be working 4 eight hour days *unless some agreement is reached to the contrary*.

(emphasis added)

That invitation, together with all of the circumstances under which Lummus had approached the other trades, leaves no doubt in our minds that Lummus was aiming toward the goal of having *all* trades adopt a work week that was in line with the Pipefitters', without the necessity of having to pay overtime under the respective collective agreements.

17. ... The closure on Friday was a direct result of the agreement negotiated with the major trade union on the job site, and neither of those events can, in the circumstances of this case, be attributed to wholly external forces. The Board in the result finds that Lummus, when it followed through on its June 30th notice, engaged in an unlawful lock-out of the complainant's members.

We agree with the submission of counsel for the respondent that the closure of the site on Friday was not in itself unlawful. What was found to be unlawful was the attempt to pressure the members of the Labourers' Union into working "make-up" hours on the other four days, in accordance with the arrangement that had been worked out with the Pipefitters and other trades on the Eldorado job site. That arrangement was to work a ninth hour on each of those four days at straight time, rather than at the overtime premium called for under the various collective agreements. The Labourers agreed to work the ninth hour only if the proper rate

under the collective agreement were paid, and Lummus withheld the work. That was the unlawful act, and the proper measure of damages is that ninth hour a day for four days a week at the overtime rate. Having been unlawfully denied the opportunity to work those hours, the grievors are now *prima facie* entitled to the value of those hours. Compare *Grey-Owen Sound Health Unit*, [1980] OLRB Rep. Jan. 223, at paragraph 21. The respondent, however, puts forward a number of arguments for denying the grievors those damages in whole or in part. Firstly, the respondent argues that this is not an appropriate case for the payment of any damages. In support of that, the respondent stated that this was not a case of egregious unlawful conduct, and that its actions were only considered to be unlawful on a "close call" by the Board. The respondent points out that it was agreed at the first hearing that it could have closed the job-site on Friday without recourse. What constituted the unlawful conduct, therefore, was the offer to the members of the Labourers' Union to work make-up hours. Had it made no offer, its conduct would have remained lawful. Should that offer then, counsel argues, cost the company \$100,000.00? Or put differently, are the members of the complainant who refused the work really entitled to what counsel has termed a "windfall" of payment for those hours?

3. We find that they are. "Close calls" only count until they are decided. After that, the burden of loss must fall upon the unsuccessful party. The respondent knew once this complaint was filed what the risks were, and it continued to maintain its position at its peril. The offer that was made to the members of the complainant was made with an illegal rider on it. The respondent, the Board concluded, was not entitled to then "freeze out" the Labourers from the ninth hour that others were working simply because the Labourers were insisting on payment in accordance with their collective agreement. If the respondent was in a difficult position because of the agreement it had made with other trades, that position, as the Board noted in its earlier decision, was not entirely free from the respondent's own making. This whole argument, in fact, is more closely related to the issue of liability, which has already been decided. It having been found that the respondent unlawfully denied the members of the complainant their ninth hour, it now falls upon the respondent to bear the risk of loss.

4. But, the respondent argues secondly, the members of the complainant have not lost anything. The respondent argues that there was only so much work to go to the Labourers, and that sooner or later, the Labourers got it all. The respondent testified that its original estimates had been to cut back its Labourer manpower through the summer by some 20 to 30 per cent, whereas in fact its Labourer complement remained relatively constant. The respondent attributes these actual manning levels to the decision to cut back weekly hours as of July 8th. It argues that the same work could be done with fewer men and more hours, or, as it says happened, with more men and fewer hours. The respondent describes its submission as "self-evident", and points out that on a construction project, there is a finite amount of work to be done, and the only question is how long it takes. Lay-off of Labourers began from September on, with a large portion being laid off just before Christmas, and the final group on January 12, 1984. The respondent points to the Labourers' lists of out-of-work registration and job referrals as demonstrating that even if the latest lay-offs had been moved back to December or late November (because 4 more hours a week had been worked through the summer), the Labourers affected would not have been referred out to jobs any sooner. The respondent argues, finally, that in construction the source of all hiring is the Union and its hiring hall, and in accordance with *Blouin Drywall Ltd.* (1974) 8 O.R. (2d) 103 (C.A.), members of the Labourers' Union should not be regarded individually for damage purposes, but as a group. Even though some of the Union's members admittedly worked a lesser number

of hours on this project as a result of the respondent's unlawful actions, other members avoided early lay-off and got *more* hours as a result of the same action. Which of the members avoided lay-off, counsel concedes, is impossible to determine, given the absence of a seniority clause, but counsel submits that this provides a further sensible reason for viewing the complainant's members as a group.

5. On the detailed evidence provided, the respondent's argument that some of the last Labourers to be laid off would not have been referred out any sooner had their lay-off been moved up a few days appears to have some merit. But that argument does not help the respondent unless it can satisfy the Board at the same time that the grievors were in fact permitted to perform all of the work that would have been available to them in any event, notwithstanding the fact that they were given four fewer hours per week than the bulk of the other trades. This argument might be a good deal more "self-evident" if we were dealing with a trade with more specialized skills, such as electricians. There would indeed be a finite number of electrical panels, for example, to be installed on a given job, and, in the absence of evidence of an outside contractor coming on site, one might well ask, at the end of the job, "Who do you *think* put those electrical panels in?" The same logic is not so readily apparent with the work of the Labourers. About 20 per cent of them were engaged in a mixed crew with carpenters to put up scaffolding for the mechanical trades, and the bulk of the remainder were employed in cleanup. The respondent does not really argue that the work of the Labourers was put aside until they could be present to do it. But counsel argues that any time spent by carpenters doing labourers' work, on the scaffolding, for example, would have an impact on the overall productivity of the job, so that more scaffolding remained to be done at a later point than might otherwise have been the case. Sooner or later, counsel argues, the labourers would have gotten their share. And as for cleanup operations, the respondent points out that the bulk of the cleanup was done on the night shift, when there was less activity on the site, and the hours of the Labourers on the night shift were never reduced. The evidence discloses, in fact, that *additional* Labourers were hired onto the night shift in the course of the summer, at the same time that the hours for Labourers on the day shift were in a state of reduction. The respondent argues, once again, that all of these employees are members of the same Union, and that no loss in the circumstances can be said to have been suffered by the Labourers as a group.

6. That last statement, in the Board's view, does not assist the respondent in a case like the present. In *Blouin Drywall Ltd.*, *supra*, the employer failed to hire *any* members of the grieving Union, as it was required to do, but rather hired non-union workers directly. The wrong, then, the Court of Appeal noted in its reasons for overturning the decision of the Divisional Court, was in fact a wrong done to the group. Damages were awarded to the Union as their agent, leaving it to the Union to identify in its own way which individuals would have been entitled. The present case is different. The individual Union members who held jobs on the day shift at Eldorado, and who were wrongly denied the opportunity to work a ninth hour a day, are readily identifiable, and other members who may have gotten the day shift's work did so only as a result of the wrongful act of the employer. The circumstances, then, are more directly analogous to a case where, for example, a Labourer is wrongfully discharged, and another Labourer is hired in his place. The second Labourer gets his opportunity only because of the first one's unlawful discharge, and it has never been viewed as an answer to the first Labourer to say that the money to which he was entitled went to another member of his Union. The employer in all such cases pays twice, not as a penalty, but because that is the only way that the first individual can be compensated for his loss.

7. The same principles undermine the respondent's argument that no damages should be paid because the same number of available hours were in fact worked by the members of the complainant as had been originally contemplated, but by a greater number of individuals. The respondent concedes that he is unable to tell the Board which employees would have otherwise been faced with a lay-off, so that it cannot be said with respect to any individual grievor who was denied the ninth hour that he was better off because of the employer's action. Had he been one of the 70 per cent or so originally scheduled to stay, of course, he would not have been better off. But more importantly, the respondent's assertion that the numbers themselves tell us that no labourer work was lost is not compelling. Even if, for example, the hours worked came out at or above the levels initially projected, it does not necessarily follow that no work has been lost to the Labourers because of the respondent's unlawful action. We have no comparable manning statistics before us for other trades, and it is possible, for example, that man-hours were increased generally for the purpose of catching up to schedule. In that event, the Labourers' hours might have been higher still, had it not been for the weekly reduction after July 8th. The numbers do not, in other words, speak for themselves. Further, there is no evidence before the Board that the job was in fact delayed because of lower productivity in scaffolding. The more natural presumption is that the company arranged to get the scaffolding erected as and when it was required, just as the cleanup work had to have been done as the work progressed. All of that work was work that would have been done by the individual grievors, had they been permitted on site for the ninth hour without unlawful condition, and there is no compelling evidence that they later had the opportunity to make that work up.

8. The individual grievors must therefore be compensated by the respondent for the work opportunities lost. The respondent is directed to forthwith make through its payroll, as the complainant has asked, payment to the individual grievors on the basis of the ninth hour they otherwise would have worked, at the overtime rate, on each of their days during the period of the lock-out, and to make the appropriate trust-fund contributions on their behalf as well. We find that those two elements will provide adequate relief to the grievors in the circumstances before us.

9. The Board will remain seized should a dispute arise over the above calculations.

CONCURRING OPINION OF BOARD MEMBER J. WILSON;

1. On the face of the evidence and argument presented in this case, I must concur with the decision.

2. This is not to say that I do not feel that there is some merit in the respondent's argument that the labourers may have been given all the work they were entitled to get, albeit over a longer period of time.

3. The problem is a paucity of hard evidence. Any experienced construction company should be able to produce and prove the man-days estimated to perform a particular facet of the work as against the actual man-days used, which would then show an overage or a shortfall.

4. Had such an approach been used by the respondent, the Board would have been

in a better position to properly assess the performance of this part of the work and been fully assured of any possible loss to the grievors.

5. Unfortunately, a hypothetical argument that the labourers performed all of the available work falls short of that goal.

1413-83-U Endel Vesik, Complainant, v. **Consolidated Fastfrate Limited**, McNeil McGrath Transport Inc. and Teamsters Union Local 938, Respondents

Duty of Fair Representation – Remedies – Unfair Labour Practice – Whether complainant employee in unit to whom fair representation duty owed – Joint position of union and employer that part-timers not intended to be represented not conclusive – Board reviewing collective agreement and practice and concluding duty owed to complainant – Failure to consult with part-timers during negotiation process breach of s.68 – Failure to extend just cause clause not ipso facto violation – Failure to grieve not violation – No prohibition in collective agreement against part-timers becoming union members – Request for reinstatement as remedy denied

BEFORE: Corinne F. Murray, Vice-Chairman, and Board Members J. Wilson and W. F. Rutherford.

APPEARANCES: *M. Gottiheil, R. Kuszelewski and E. Vesik for the complainant; P. J. Thorup, B. Singleton, M. Freeman and M. Gordon-Whiting for the respondent companies; Douglas J. Wray and Val Neal for the respondent union.*

DECISION OF THE BOARD; May 31, 1984

1. This is a complaint pursuant to section 89 of the *Labour Relations Act* wherein the complainant alleges breaches of sections 66(b) and 68 of the Act. Sections 66(b) and 68 provide as follows:

66. No employer, employers' organization or person acting on behalf of an employer or an employers' organization,

(b) shall impose any condition in a contract of employment or propose the imposition of any condition in a contract of employment that seeks to restrain an employee or a person seeking employment from becoming a member of a trade union or exercising any other rights under this Act.

68. A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

It was agreed at the outset of the hearing into this complaint that McNeil McGrath Transport Inc. be added as a respondent. While the respondents admitted to some uncertainty as to the jurisdiction under which their labour relations fall, all agreed that they would not object to this Board's jurisdiction to hear this complaint. This position was specified to be without prejudice to any future matters which may arise.

THE FACTS

2. The complainant had been employed as a dockhand on a part-time basis by Consolidated Fastfrate Limited and/or McNeil McGrath Transport Inc. (both of which will be referred to herein as "McNeil McGrath") between November 1980 and June 10, 1983. On average he worked 8 hours per week. From week to week the variation of hours could be between 2 and 15 hours and it was not unusual for several weeks to pass without him being required to work at all. The complainant generally was notified that he was required for work on the same day as the work was to be performed. This was usually a Friday evening between 5 and 7 p.m. Although he was not required to do so, he would call McNeil McGrath in advance of Friday if he knew he would not be available to work. Between November 1980 and January 1982, the complainant held a full-time position as a laboratory technician with Inglis Ltd. His part-time work supplemented his income. Between January 1982 and January 1983 the complainant attended a community college on a full-time basis and his work with McNeil McGrath helped him to survive through this period. After completing his community college course, the complainant took full-time employment as a service technician at Nelma Data Corp. but nevertheless continued to work part-time with McNeil McGrath. It is undisputed that during the whole of his employment with McNeil McGrath he never sought to work there on any other basis than part-time. It is also undisputed that the complainant in the spring of 1981 sought and obtained from a steward (Bob Campbell) of Local 938 at McNeil McGrath a copy of the collective agreement which preceded the current collective agreement (October 1, 1982 – September 30, 1985) between the respondents. As a result of reading the collective agreement and the advice of Mr. Campbell, the complainant believed that as a part-time employee, he was not "covered by the collective agreement". There is some difference in the complainant's testimony describing his perception of his connection with Local 938. On the one hand he testified that he thought he was a union member as a result of the deduction from his paycheque of an amount equivalent to union dues. However, when cross-examined about why he had not grieved he indicated that he could not grieve because he had been led to believe that he "was not in the union". The complainant acknowledged that throughout his employment at Inglis he had been represented by the United Steelworkers of America and that he had acted as a steward for 7 months. He acknowledged that he had paid no initiation fee to the Teamsters nor had he received a union card, but he believed that he had signed an authorization card to allow the amounts equivalent to union dues to be deducted from his paycheque and remitted to the Teamsters. In view of this, we conclude it is more likely that the complainant recognized he was not a member of the Teamsters and accepted the deduction of money from his paycheque as the price he had to pay to enjoy part-time work. During his employment as a part-time employee, the current collective agreement was negotiated. He took no part in trying to seek changes to the collective agreement affecting part-timers and did not try to attend union meetings in this regard.

3. June 10, 1983 was the complainant's last day worked. After that he received no more calls from McNeil McGrath. On July 15th he called Ron McCracken, an employee of

McNeil McGrath responsible for calling in part-time employees, and inquired about his situation. The complainant was advised that he was no longer on the part-time employee list and that he would have to call Mike Elimente, an employee of McNeil McGrath who had taken over Mr. McCracken's responsibilities in connection with part-time employees. The complainant spoke with Mr. Elimente the same day and was told that he had received orders to hire all new part-time employees. Mr. Vesik testified that Mr. Elimente said the reason for this was that part-timers got too comfortable after they had been on the list for a while. Mr. Elimente invited Mr. Vesik to visit the dock area and see for himself that the part-timers were all newly hired. When Mr. Vesik visited the dock area, he tried to find Greg Currie, the steward of that area, but since Mr. Currie was not present, spoke instead with Mr. Campbell, by this time a former steward. Mr. Campbell advised Mr. Vesik that the union could not do anything for him because he was not a union member, even though he had paid union dues. About a week later, Mr. Vesik spoke with Mr. Currie about his situation. Mr. Currie promised to talk to Mr. Elimente. Mr. Currie reported back to Mr. Vesik that the union could not do anything for him and Mr. Elimente claimed that the reason for Mr. Vesik being taken off the part-time list was because he had taken a 45-minute lunch break. Mr. Currie suggested he speak with Gerry Massicotte, who Mr. Currie explained had been a complainant in a similar case to that of Mr. Vesik's and who had ultimately "lost". He also recommended he call Ray Kuszelewski at the York University Legal Aid Clinic. Finally, Mr. Currie gave Mr. Vesik the name of Val Neal, the business agent for Local 938. Mr. Vesik contacted all of these people. He testified that he spoke by telephone to Mr. Neal on August 18th. Mr. Neal, after being advised by the complainant of the details of his situation, told Mr. Vesik that he had no right to file a grievance because he was not covered by the collective agreement. Mr. Vesik further testified that Mr. Neal said that the purpose for the paying of amounts equivalent to union dues was to be given the right to work as a part-time employee and such payment did not give part-time employees any of the benefits or conditions of employment in the collective agreement. Notwithstanding this, he said he would contact McNeil McGrath to see what he could do. About an hour after this conversation with Mr. Neal, Mr. Vesik received a telephone call from a Mike Freeman, Vice-President of Operations for McNeil McGrath, who told him that he had been taken off the part-time list because he had a full-time job and others did not, because McNeil McGrath was trying out part-time employees who had previous related experience with the intention of making them full-time, and because students were being employed to save money through federal grants received on account of their employment. Mr. Vesik did not call or receive a call from either Mr. Neal or Mr. Freeman again. His next step was to file the instant complaint.

4. Both Mr. Currie and Mr. Neal testified and substantially corroborated what Mr. Vesik had said in his evidence. A few additional details bear mentioning. Mr. Neal, who has been responsible for McNeil McGrath's bargaining unit since approximately 1969/70 and who has been business representative for Local 938 since 1967, testified that Article 28 (entitled "Part Time Help") of the collective agreement has been largely unchanged during the time Mr. Vesik has been employed with McNeil McGrath. He testified that part-time employees played no part in the negotiations of a collective agreement, either at the proposal stage or ratification stage. The only "benefits" part-time employees received under the collective agreement was vis-a-vis wages, which were established at 1¢ to 5¢ less than the full-time rates. The purpose of Article 28 was to ensure that McNeil McGrath did not use part-time employees "at the expense of full-time employees" and that part-time employees were only used as a supplementary labour source. Dues were deducted from part-time employees because this

was a condition of employment with McNeil McGrath. Other Articles in the collective agreement dealing with Students (Article 27), Casual Help (Article 29), Hired City Equipment (Article 30) and Brokers (Article 31) were also negotiated to protect the full-time employees and to avoid the erosion of their unit i.e., so that the unit did not end up consisting of primarily part-time employees, brokers and casuals. All of these types of employees are required to pay for the "support" of Local 938 through a checkoff of amounts equivalent to monthly dues. Mr. Neal's recollection of his conversation with Mr. Vesik is that he advised Mr. Vesik that if he was fired because he had become complacent, he thought this was "bullshit" and he would check it out for him. While he acknowledged he probably told him he had no right to grieve, he also claimed he told Mr. Vesik that if he were terminated for unjust cause, "he'd have something" otherwise he didn't. Under cross-examination he said he meant that if a part-time employee had been unjustly treated, he would try to help, but such help would be extended outside the provisions of the collective agreement. Under cross-examination Mr. Neal was unclear about the precise position of part-time employees vis-a-vis Local 938. He was asked whether it was fair to say that part-time employees were not "represented" by Local 938. His answer was that they were not covered by the collective agreement. When asked point blank whether Local 938 "represented" part-time employees, he answered that he guessed they were not "in terms of what (counsel for the complainant) was saying". He acknowledged that part-time employees are not allowed to be union members and that there are never any meetings held for part-timers concerning the negotiation of the collective agreements. Mr. Neal testified that part-time employees have no rights or obligations in connection with Local 938 and, except for clauses in the collective agreement specifying when they work, for how long and at what rate of pay, Local 938 does not negotiate their terms and conditions of employment.

5. There was no evidence led indicating that Local 938 has been certified as bargaining agent. The relevant portions of the collective agreement before us are as follows:

ARTICLE 1

PREAMBLE AND RECOGNITION

Section 1.1 – Union Recognition

The Company does hereby recognize the Union as the exclusive bargaining agent for certain employees employed by the Company at all Company terminals within the jurisdiction of Locals 91 and 938.

Section 1.2 – Scope of Bargaining Unit

The term "employee" shall mean all employees save and except foremen, those above the rank of foreman, office staff, sales staff, security guards and office janitors.

Section 1.4 – Intent and Purpose

The intent and purpose of this Agreement shall be to promote and improve industrial and economic relations in the Industry, to establish and

maintain discipline and efficiency and to set forth herein the basic Agreement covering rates of pay, hours of work and conditions of employment which will render justice to all. The parties hereto desire to co-operate in establishing and maintaining proper and suitable conditions in the Industry, to provide methods of fair and peaceful adjustments of all disputes which may arise between them and to foster good will and friendly relations and better understanding between the parties.

ARTICLE 2

Section 2.1 – Maintenance of Membership

It is agreed that all Union members shall maintain their Union membership in good standing for the duration of this Agreement as a condition of employment.

Section 2.2 – Union Dues Authorization

All employees hired prior to the date of the signing of this Agreement must, as a condition of their continued employment, authorize the Company to deduct from their pay on the pay day the Local Union's dues deductions are made, an amount equal to the Local Union's monthly dues for the duration of the Agreement as their financial contribution to the Local Union.

Section 2.3 – Initiation Fee Deductions

All employees hired shall, as a condition of continued employment, authorize the Company to deduct the amount equal to the Local Union's Initiation Fees in instalments of twenty-five dollars (\$25.00) per week after the completion of the probationary period. This deduction shall continue until the Initiation Fee is paid in full. The Company agrees to remit such monies so deducted to the head office of the Local Union along with a list of the employees from whom the money was deducted at the same time as the Union dues are remitted.

Section 2.4 (a) – Deduction of Union Dues

The Company agrees for the duration of this Agreement to deduct from the last pay cheque each month the monthly dues of any employee covered by this Agreement and to remit such monies so deducted to the head office of the Local Union along with a list of the employees from whom the monies were deducted not later than the tenth (10th) day of the month following the date upon which such monies were deducted. The checkoff list will include social insurance numbers and names designated by terminals within the jurisdiction of each Local Union. In the case of an employee on Workmen's Compensation, the checkoff shall indicate that such employee is on "W.C.B."

Section 2.4 (e) – Scope of Union Dues Deductions

The deduction of Union dues shall be made from every employee including, but not limited to, probationary employees. In the event that a probationary employee fails to complete his probationary period, Union dues will be deducted from his final pay cheque.

ARTICLE 3

MANAGEMENT FUNCTIONS

Section 3.1 – Management Functions

The Union recognizes that the Company has the right of manage [sic] the business, to exercise all the prerogatives of management, and without affecting the generality of the foregoing, it has the right to determine the size of and direct the work force, to extend or curtail operations, and to hire and promote, except to the extent that the said rights and prerogatives have been specifically delegated to the Union or otherwise curtailed in this Agreement. The Company also has the right to discharge, suspend or otherwise discipline employees for just cause.

Section 3.2 – Rights of Employees

The above clause shall not deprive the employee of the right to exercise the Grievance Procedure as outlined in this Agreement.

ARTICLE 6

GRIEVANCE PROCEDURE AND ARBITRATION

Section 6.1 – What Constitutes a Grievance

A grievance shall consist of a dispute concerning interpretation and application of any clause in this Agreement, alleged violation of the Agreement and alleged abuses of discretion by supervision in the treatment of employees contrary to the terms of the Agreement. If any question arises as to whether a particular dispute is or is not a grievance within the meaning of these provisions, the question may be taken up through the Grievance Procedure and determined, if necessary, by arbitration.

Section 6.7 – Powers of Board of Arbitration

The Board of Arbitration shall not have the right to alter or change any provisions in this Agreement, or substitute any new provisions in this Agreement, or substitute any new provisions in lieu thereof or to give any decision inconsistent with the terms and provisions of this Agreement. The Board, however, shall have the power to vary or set aside any

penalty or discipline imposed relating to the grievance then before the Board.

ARTICLE 8

Section 8.4 – Probationary Period

Employees shall be considered probationary until placed on the seniority list. Once an employee has exceeded eight (8) hours in any one work week, such employee shall work under the provisions of this Agreement and shall be employed on a probationary basis for thirty (30) calendar days during which period he may be terminated or disciplined without recourse to the Grievance Procedure. The company may not terminate such employee for the purpose of forcing an additional probationary period. Upon completion of the thirtieth (30th) calendar day, the employee shall either be terminated or placed on the regular seniority list as of the date of commencement of his probationary period.

ARTICLE 28

PART-TIME HELP

Section 28.1 – Definition

Part-time help shall be defined as persons who are employed by the Company to supplement the normal work force and they shall perform such work on terminal premises only.

The Company agrees that where it is necessary to use part-time help the following conditions shall apply:

Section 28.1 (a) – Deduction of Dues

The Company shall deduct from all part-time help from their first pay and each month thereafter an amount equal to the Union dues and such monies shall be forwarded to the Local Union as outlined in Article 2 together with a list which shall show the names of persons for which the dues are remitted and the number of hours worked by such persons on an individual basis and the company shall indicate on the checkoff form that such employee is a part-time employee.

Section 28.1 (b) – Conditions

Where the hours worked by part-time help exceed four (4) hours in any one (1) day or eight (8) hours in any one (1) week, the Company will, upon receipt of a grievance(s), pay to the senior employee(s) who files such grievance(s), who would have been available to perform such work, an amount equal to the time worked by the part-time employees in excess of the daily or weekly limitation.

Where the hours of work of a part-time person exceed eight (8) hours in any one (1) week, such person shall be considered a probationary employee and the conditions of this Agreement shall then apply.

The Company agrees not to use back to back shifts of part-time personnel in place of regular employees and nothing in this Article will be used to defeat the hiring of regular employees providing such are available.

Section 28.1 (c) (1) – Laid Off Regular Employees

Laid off regular employees shall be given the first opportunity for part-time work and they will be entitled to the daily call-in guarantee.

Section 28.1 (c) (2)

Prior to part-time help being used, all regular employees will be given the opportunity to do such work. This work may involve returning to work later on that given day and these employees will be notified prior to the end of their shift.

Section 28.1 (d) – Regulation of New or

Additional Part-time Employees

The Company agrees that where new or additional part-time help is required, the Company will contact the Local Union. In the event the Local Union is unable to supply qualified persons, the Company shall obtain such help from any available source.

Section 28.1 (e) – Rates of Pay

Part-time help exclusive of laid off regular employees shall receive the same minimum scale as regular employees but are not otherwise covered by the terms of this Agreement.

Section 28.1 (f) – Preference of Regular

Employees

Part-time help shall not be used on a shift or starting time to deprive regular employees of their normal hours of work.

Section 28.1 (g) – Part-time Employees Not to

Deprive Hiring of Regular Employees

Where the Local Union establishes that part-time help is being used where a regular employee could be gainfully employed, the Company shall replace part-time people with one or more regular probationary employees.

Section 28.1 (h) – Disputes Procedure

Where the Local Union feels that there is a violation of the intent in the application of the above clauses, the Company will meet to discuss the problem with the Local Union. If no amicable solution can be reached, the grievance shall be submitted to Arbitration as outlined in Article 6.

Section 28.1 (i) – Time Cards and Hours Worked

Each part-time employee shall be required to punch a time card. Shop Stewards to be supplied, once a week, with a list of part-time employees and the number of hours worked by such persons on an individual basis.

Section 28.1 (j)

The Company shall supply the Local Union(s) with a list of all part-time employees on a monthly basis.

Section 28.1 (k)

The Company agrees that no part-time help will start prior to 5:00 p.m. on any day.

SUBMISSIONS

6. The complainant argues that Articles 1 and 2 relate to “part-time” employees (employees who work less than 8 hours in a week) as well as full-time employees. Section 2.3 is exceptional in that only those who complete the probationary period are allowed to pay initiation fees. Article 8 (section 8.4) and Article 28 (section 28.1(b)) provide that a probationary period is applicable only to those employees who work in excess of 8 hours in any one week. Therefore, part-time employees cannot pay initiation fees pursuant to section 2.3. Article 3, which catalogues the prerogatives of management to which the union accedes, specifies that the company has the right to discharge, suspend or otherwise discipline “employees” for just cause. The complainant points out that there is no qualification on the word “employees” in this Article. Section 3.2 gives the individual employee the right to grieve and the complainant was wrongfully deprived of this right. The complainant argues that it is a “principle of collective bargaining” that where a union is the exclusive representative of those in a bargaining unit, it must represent all members of that unit. If section 28.1(e) withdraws from part-time employees particular benefits negotiated for full-time employees, then to this extent there has been an “illegal withdrawal” of the duty to represent all. While conceding that a bargaining agent can legally negotiate different benefits and conditions of employment for some employees in the bargaining unit, this becomes illegal when there is a “withdrawal of the representation duty”. The complainant argues that there has been a withdrawal of such duty on the facts of this case because:

- (1) the “language of the collective agreement put part-time employees outside representation” (the complainant relies on Mr. Neal’s evidence as confirmation of this);

- (2) the union should have written a grievance for Mr. Vesik because he himself could not write one claiming that he was unjustly discharged; and
- (3) the union negotiated provisions for hours of work, rates of pay, and type of work for part-time employees without consultation with part-time employees affected.

The complainant argues further that the scheme of the *Labour Relations Act* and collective bargaining did not intend that the part-time employees "carve out their own rules for behaviour" by the company in their connection and *vice versa*, which rules are outside the collective agreement.

7. The complainant submitted that McNeil McGrath was added as a respondent and should be found in breach of section 66(b) of the Act because it "participated in limiting the rights of an employee under the Act". The particular right limited was the right to participate in union activities, i.e., using the grievance procedure and becoming a member of a union. The company and union in negotiating this particular collective agreement limited such right. The complainant further argues that by not changing the scope clause of the collective agreement to eliminate part-time employees, both the company and union violated section 66(b) of the Act.

8. The complainant's counsel cited the following authorities: Chapter 5 (paragraph 11:22) and chapter 9 (para. 13:00) of Brown & Beatty's *Canadian Labour Arbitration* and decisions footnoted in each such paragraph; *Fisher v. Pemberton et al.* (1969) 8 D.L.R. (3d) 521; *Prinesdomu and CUPE 1000 et al.*; [1975] OLRB Rep. May 444; *Ontario Hydro v. Ontario Hydro Employees' Union Local 1000*, 83 CLLC ¶14,042 (Ont. C.A.); *Retail Clerks Union Local 409 v. Northwest Merchants et al.*, 83 CLLC ¶16,055 (O.L.R.B.); *London Association of Painting and Decorating Journeymen and Gaymer & Oultram, (London)*, 54 CLLC ¶17,073 (O.L.R.B.); *CSAO National (Inc.) v. Oakville Trafalgar Memorial Hospital Association et al.*, 72 CLLC ¶14,118 (Ont. C.A.); *Wallace Corporation* (1944), 323 U.S. 248 (NLRB); *Syndicat Catholique des Employes De Magasins de Quebec, Inc. v. Compagne Paquet Ltee.*, (1959) 18 D.L.R. (2d) 346 (S.C.C.); and *Rayonier Canada (B.C. Ltd.)* (1975), 2 Can. LRBR 196 (B.C.L.R.B.). Paragraph 11:22 in Chapter 5 of Brown & Beatty was cited to establish that the term "employee" must be defined to include *all* employees unless there is a specific exclusion. Paragraph 13:00 in Chapter 9 of Brown & Beatty, together with *Fisher v. Pemberton, supra*, and *Prinesdomu, supra*, were cited in support of the proposition that any member of the bargaining unit can use the grievance procedure in a collective agreement. *Ontario Hydro, supra*, was cited as an example of where the Act was used to entitle a probationary employee to use the grievance procedure in the collective agreement. *Northwest Merchants, supra*, was cited to support the proposition that the scope clause of any collective agreement is "negotiable" and that if a scope clause includes a certain group of employees who have amounts equivalent to union dues checked off, it makes sense that these employees have the right to be represented by the trade union pursuant to section 68. *CSAO (National) Inc.* was cited to support the proposition that a union must represent all members of the bargaining unit. The remaining cases show that Canadian law is based on the twin concepts of majoritarianism and exclusivity of representation: "One Voice for All Employees". Given that Mr. Vesik was "disenfranchised", based upon the respondents' interpretation of the collective agreement, the complainant sought the following remedies:

- (1) an order reinstating him to part-time employment;
- (2) a declaration that the grievance procedure is available to part-time employees under the collective agreement;
- (3) an order that McNeil McGrath inform all its employees that the grievance procedure is available to part-time employees;
- (4) an order directing Local 938 to inform each and every part-time employee in its jurisdiction that the Local will in future fairly represent them through the grievance procedure.

9. The respondent, Local 938, submitted a 5-part argument as follows:

- (1) the complainant lacks status to complain under section 68 because he has never been in the bargaining unit and, therefore, Local 938 has never owed him a duty under section 68;
- (2) in the alternative, there has been no violation of section 68 proved regarding the treatment of Mr. Vesik;
- (3) the complaint, in any event, ought not to be entertained in view of Mr. Vesik's delay in raising his complaints about the negotiation of terms of the collective agreement relating to him as a part-time employee;
- (4) there has been no violation of section 68 in regard to the terms negotiated in the collective agreement; and
- (5) even if there has been a violation of section 68 (which Local 938 does not admit), the only remedies available to the complainant are:
 - (i) referral to arbitration, or
 - (ii) referral to Local 938 for reconsideration; and

neither are appropriate. The referral to arbitration was not primarily requested by the complainant because of an arbitration decision, *Re Humes Transport Ltd. and Teamsters Union, Local 938*, 1 L.A.C (3d) 385 which was the result of a Canada Labour Relations Board decision (*Gerald M. Massicotte and Teamsters Union Local 938 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, et al.*, (1980) 1 Can. LRBR 427 (C.L.R.B.), appl. for jud. rev. dismiss'd 34 N.R. 611 (F.C.A.), appeal to S.C.C. rejected 44 N.R. 340) relating to the same collective agreement as is before this Board. The arbitration board found that Mr. Massicotte, as a part-time employee, had no substantive right to be discharged only for just cause and therefore found itself to be without jurisdiction to deal with the grievance lodged.

10. Local 938 argues that Mr. Vesik is, in fact and in law, not an employee in the bargaining unit which it represents in collective bargaining. While the Canada Labour Relations Board and the arbitration board in the *Massicotte* case held that Mr. Massicotte was an employee in the bargaining unit, these decisions are wrong. In support of this argument Local 938 points out that section 1.1 of Article 1 recognizes the union as the exclusive bargaining agent for "certain employees" and there is therefore a limit on the union's representation rights and obligations. These limitations are found by reading the rest of the collective agreement as a whole. While section 1.2 may *appear* to include part-time employees in the bargaining unit, this is not true when reference is made to section 1.1 and other Articles of the collective agreement, namely, sections 2.3, 2.4(a), 3.1, 3.2, 6.1, 6.7 and 8.4. All of these sections contain words of limitation indicating that not all employees are covered by the collective agreement. It is of particular note in this regard that section 8.4 provides that only those that work more than 8 hours per week accumulate seniority and work under the provisions of the collective agreement. Articles 8 through 27 apply only to employees "under the collective agreement" – none are applicable to part-time employees. Articles 27, 28, 29, 30 and 31 *restrict* the employment of certain types of employees in order to protect the full-time bargaining unit. In each Article there is specific provision that no other part of the collective agreement applies to these particular groups of employees (pertinent to this case section 28.1(e) specifies this). A close examination of Article 28 itself reveals that the parties never intended that part-time employees would be part of the bargaining unit. Virtually every section of this Article is aimed at protecting the hours and wages of the bargaining unit made up of full-time employees. Three sections of Article 28 support the argument that neither Mr. Vesik nor any other part-time employee was intended to be encompassed within the bargaining unit represented by Local 938. Firstly, section 28.1(a) provides that the company must deduct from the pay of all part-time help an amount "equal to union dues". If part-time help are covered by all of the other provisions of the collective agreement, then this section is redundant because Article 2 (section 2.4(a)) requires the equivalent of union dues to be deducted from the pay of employees "covered by this Agreement". Secondly, section 28.1(b) provides that if a part-time help works in excess of 8 hours in any one week, then that person becomes a probationary employee and "the conditions of this Agreement apply". If any of the conditions of the collective agreement already apply, as the complainant argues, this also is a redundant provision. Finally, section 28.1(e) specifies explicitly that the only provision in this Agreement which applies to part-time help is the provision regarding minimum pay to regular employees. Section 28.1(e) states clearly that aside from this provision, part-time help "are not otherwise covered by the terms of this Agreement". In interpreting section 28.1(e), two canons of contractual interpretation should be utilized, i.e., that a specific provision (section 28.1(e)) should be considered to override a general one (the scope clause) and that a provision appearing later (section 28.1(k)) should be considered as overriding the earlier (scope clause). Local 938 also argued that if the collective agreement is ambiguous as to the precise definition of the scope of the bargaining unit, the Board may properly have reference to the practice of the parties. In support of this latter proposition the respondent union cited *Silverstein's Bakery*, [1983] OLRB Rep. Dec. 2095; *General Concrete of Canada Ltd.*, 1 L.A.C. (2d) 187, appl. for jud. rev. allowed 22 O.R. (2d) 65 (Div. Ct.), leave to appeal granted, motion to quash appeal allowed September 18, 1979 since issue had been settled between the parties 23 L.A.C. (2d) 144; *Victoria Hospital*, 17 L.A.C. (2d) 204; *Canadian Red Cross Blood Transfusion Service*, [1981] OLRB Rep. Feb. 137; *International Union of Operating Engineers Local 793*, [1981] OLRB Rep. June 692.

11. In the alternative, the respondent union argues that no violation of section 68 has

been established vis-a-vis Mr. Vesik's treatment by Local 938. Both Mr. Neal and Mr. Currie advised Mr. Vesik correctly that he had no substantive right which he could grieve. This was correct because section 28.1(e) says this clearly – the provisions relating to the circumstances in which an employee in the bargaining unit could be discharged did not apply to Mr. Vesik. The correctness of this interpretation of section 28.1(e) is underlined by the arbitration board's decision regarding Mr. Massicotte's discharge, *supra*. The argument of the complainant is illogical to the extent that there is only a partial selection as to which Articles are applicable to part-time help, particularly Mr. Vesik. The *Ontario Hydro* case, *supra*, which the complainant relies on, merely elaborates upon the distinction which must be drawn between substantive rights and procedural rights under a collective agreement. It established that in the case of probationary employees who have been granted substantive rights to discharge based on just cause, these rights could not be procedurally blocked by the collective agreement. Also, insofar as part-time and casual employees are concerned, there is a line of arbitral jurisprudence (unmentioned in the spate of probationary employee cases) which indicates it is legally possible to block these employees' access to the grievance procedure in cases of discharge, e.g., *Bell Canada*, 16 L.A.C. (2d) 236 wherein regular part-time employees covered by the collective agreement were found to have no right to grieve their discharge (the arbitration board specifically found that section 155 [comparable to section 44 of the Act] of the *Canada Labour Code* did not give employees the right to grieve); *Re City of Toronto and C.U.P.E.*, 20 L.A.C. (2d) 191; *Re Municipality of Metropolitan Toronto and Canadian Union of Public Employees, Local 43*, (1980) 26 L.A.C. (2d) 320. In addition, there has been a Newfoundland Court of Appeal decision wherein the award of an arbitration board allowing a probationary employee the right to grieve based on section 155 of the *Canada Labour Code* was quashed (*CALEA v. Eastern Provincial Airlines* (1982) 140 D.L.R. (3d) 369, leave to appeal to S.C.C. refused). Therefore, even if Mr. Vesik is found to be part of the bargaining unit, Local 938 may lawfully restrict access to the grievance procedure for part-time help so that no grievance is permitted where no substantive rights regarding discharge have been provided in the collective agreement. Even if it be found that Mr. Neal's and Mr. Currie's advice regarding Mr. Vesik's right to grieve is incorrect, this does not *ipso facto* lead to the conclusion that section 68 has been violated because it has been shown that they put their minds in a rational way to the merits of his grievance. If this complaint amounts to an attack on the collective agreement and to an attempt to amend the collective agreement to allow part-time employees to grieve their discharge (both of which purposes Local 938 alleges are primarily behind this complaint), there has been such a substantial delay in raising these criticisms of the exercise of Local 938's duty of representation vis-a-vis negotiations that the Board ought to exercise its discretion pursuant to section 89(5) and refuse to consider the complaint simply on the basis of delay (cf. *Sheller-Globe*, [1982] OLRB Rep. Jan. 113, appl. for jud. rev. dismissed 42 O.R. (2d) 73 (Div. Ct.)). Not only would the granting of the right to file a grievance not assist him, in view of the *Massicotte* arbitration board decision, *supra*, but there is substantial Board authority that a bargaining agent can make legitimate choices between or among parts of the bargaining unit it represents in negotiations (*C.U.P.E. Local 43*, [1982] OLRB Rep. Jan. 124; *Royal Ontario Museum*, [1980] OLRB Rep. Jan. 106). In this case the Board has no evidence of any unlawful choices being made to protect full-time employees against reduced hours or layoff by restricting the use of part-time help, students, casual employees, brokers, etc.

12. Finally, Local 938 submits that neither the remedy of referral to arbitration nor referral to Local 938 for reconsideration are appropriate. As mentioned in paragraph 9 above, the arbitration board dealing with the grievance of Mr. Massicotte properly found that he had

no substantive right to be discharged only for just cause; therefore, this remedy is useless and has not been primarily or clearly requested by the complainant. If the grievance of Mr. Vesik is referred back to Local 938 for reconsideration (a remedy which the Canada Labour Board seems to be preferring, post-*Massicotte* in these circumstances [cf. *Boreal Navigation Limitee*, [1982] 2 Can. LRBR 241]), there must necessarily be a direction to amend the collective agreement so that the illegal provisions are changed. In this respect it is submitted that the Board does not have any jurisdiction to direct the parties to a collective agreement to amend it. Insofar as such directions strike out section 28.1(e), the Board also has no jurisdiction. Finally, the other remedies requested by the complainant amount to requests for the amendment of the collective agreement. No basis for them in this case has been established and the complainant was unable to cite any previous cases where such remedies have been granted.

13. Local 938 also submits in connection with the alleged violation of section 66(b) that the Act does not grant to an employee in the bargaining unit the right to participate in the grievance procedure regardless of what the collective agreement provides. To find this right where there is no clause in the collective agreement providing for this (especially where there is no prohibition against discharging part-time help) would be beyond the Board's jurisdiction. *International Wallcoverings*, [1983] OLRB Rep. Aug. 1316, stands for the proposition that there is no violation of the Act for an employer to take the position that it will not allow grievances regarding striking employees' discharges where the acts complained of occur when no collective agreement is in effect. If this is possible, then negotiation of a collective agreement where discharges can occur without cause and no grievance regarding them is permitted should be seen as lawful.

14. The respondent employer supports all the arguments of Local 938 specifically amplifying on arguments responding to allegations by the complainant that section 66(b) of the Act was violated. The employer submitted that the language of section 66(b) is not amenable to being applied to a bilateral arrangement such as a collective agreement. The words used in this section suggest something other than a collective agreement when it specifies "contract of employment" and uses the word "impose". Section 66(b) seeks to restrain employers from interfering with trade union membership. The collective agreement does not interfere with this right. The phrase "or any other right under the Act" does not include any right to have a discharge arbitrated according to a "just cause" standard. This having been said, it must be asked what rights are being referred to by the complainant in his allegations regarding section 66(b). No right has been shown or identified by the complainant. Section 44, referred to in the complaint, does not establish a right "no matter what" to have a discharge occur only for just cause.

DECISION

15. Section 68 of the Act imposes upon a trade union which is "entitled to represent employees in a bargaining unit" the duty to represent those employees in good faith, without discrimination and without arbitrariness. For this section to apply, the complainant must establish that he was an employee in a bargaining unit which the respondent is "entitled" to represent (see *Canadian Red Cross Blood Transfusion Service*, *supra*; *James Mason*, [1979] OLRB Rep. Feb. 116 and cases cited therein at paragraph 3). Under the Act, a trade union becomes entitled to represent employees in a bargaining unit either through certification pursuant to sections 7(3) or 8 or through voluntary recognition pursuant to section 16(3). The evidence before us does not indicate whether Local 938 originally became entitled to represent

employees of McNeil McGrath by certification or recognition. For the purposes of determining representation rights in this case, it is irrelevant which way such status was initially achieved because it is well established that once a collective agreement is concluded, the collective agreement generally becomes the source and description of representation rights (see sections 5(4) and 57(2) of the Act and *White Spot Limited*, (1976) 1 Can. LRBR 241 (B.C.L.R.B.)). In this sense once a collective agreement is in place, a relationship commenced under the compulsion of a certificate of the Board is transformed into a voluntary recognition type of relationship.

16. The complainant asks us to conclude that Local 938 was “entitled” to represent the complainant and therefore owed him a duty under section 68. The respondents contend that Local 938 never had such entitlement and therefore owed him no duty. Reliance in support of both of these positions is placed on the collective agreement before us; but, over and above this, we are asked by the respondents to resolve any ambiguity we may detect in the collective agreement in their favour because both say they never intended that the complainant or, indeed, other part-time employees be a part of the group for whom Local 938 had representation rights. Where the parties to the collective agreement agree, as they do on the facts before us, that it was never their intention to grant recognition or be recognized for a certain group of employees, the Board must have compelling evidence to lead it to a conclusion contrary to this position. On the other hand, a complaint under section 68 cannot fail simply because the parties to the collective agreement, *both* of whom may be affected by any finding of violation under section 68 and remedy ordered as a result, present a united front to the Board and deny any intention that the complainant be “represented” by the union.

17. Preliminary to our consideration of the collective agreement before us, it is necessary to set out some elementary propositions regarding the nature and legal effect of recognition clauses in collective agreements. Normally, the parties in the initial Articles of the collective agreement set out a “recognition clause” which describes the group of employees in the bargaining unit for whom the union has representation rights. This clause serves two purposes:

- (1) defining representation rights for applications pursuant to the *Labour Relations Act* (e.g., certification or termination) or, for future bargaining; and
- (2) stating the employees who are covered by the provisions of the collective agreement.

Generally these two aspects are coincidental, i.e., those who the union is entitled to represent by reason of the recognition clause are usually also covered by the collective agreement (see *Silverstein's Bakery Limited*, *supra*, as an example). The converse proposition is not necessarily true, i.e., those covered in some of the provisions of the collective agreement are not necessarily those employees who the trade union is entitled to represent (see *Canadian Red Cross Blood Transfusion Service*, *supra*; *International Union of Operating Engineers, Local 793*, [1981] OLRB Rep. June 692; *Victoria Hospital Corporation and Service Workers Union*, *supra*).

18. It is obvious that a recognition clause is a key and important element in the parties' bargaining relationship since it defines future relations and articulates to whom the collective

agreement is applicable. The dimensions of the bargaining unit and, hence, recognition are, subject to the *Labour Relations Act*, essentially those of the parties' own making. It is clear that revisions to the certified or recognized unit must not be a bargaining issue which is pressed to impasse (see *Northwest Merchants Ltd.*, *supra*, and cases cited therein at paragraph 29) and that such revisions do not violate section 68. While the importance of such clauses to the parties, to third parties who may make certification applications and the employees who may bring a termination application under section 57(2) makes it desirable that parties be clear as to their intention and have the language they use accurately reflect the realities of their relationship, these clauses sometimes fall short of this mark. In those circumstances the Board has recognized that the parties' intentions must be inferred from the entire document and where an ambiguity exists, from the conduct of the parties as well (see *Canadian Red Cross Blood Transfusion Service*, *supra*).

19. In the collective agreement before us, the recognition of Local 938 is physically separated from the definition of the scope of the bargaining unit. This separation is more illusory than real, however, because the "definition of the bargaining unit" as set out in Article 1, section 1.2 is really a definition of what the term "employee" means when used in the collective agreement. Reading sections 1.1 and 1.2 together, as one must, the employer seems to be granting recognition to Local 938 for "all employees save and except foremen, those above the rank of foreman, office staff, sales staff, security guards and office janitors". The fact that section 1.1 has the term "employee" modified by the adjective "certain" only indicates that the parties did not want to appear to be recognizing all "employees" (which term can have a wide application) when section 1.2 describes a bargaining unit which is a smaller segment of employees. We have concluded that "certain employees" mean those described by section 1.2, i.e., all those who are not foremen, or above the rank of foreman, office staff, sales staff, security guards, and office janitors.

20. Unless there is something else in the remaining portions of the collective agreement or in the practice of the parties to lead to the opposite conclusion, sections 1.1 and 1.2 give Local 938 entitlement to represent the complainant and others like him and, therefore, impose a duty on Local 938 under section 68. The respondent union argues that because Article 28, section 28.1(e) states that part-time employees are not covered by the collective agreement, this effects an amendment to the recognition clause. The complainant argues that section 28.1(e) does not and cannot amend the recognition clause without there being a breach of section 68. We cannot accept the complainant's argument which asks us to conclude simply from sections 1.1 and 1.2 that Local 938 owes the complainant a duty under section 68 and that section 28.1(e) is an "illegal withdrawal" of this duty. This argument seeks to have us refuse to examine the collective agreement as a whole to determine representational rights and *restrict* our assessment to whatever is designated as the "Recognition Clause". This we are not prepared to do. Even having rejected this argument, we are left with the question of whether section 28.1(e) amends the obvious effect of sections 1.1 and 1.2 or at least creates an ambiguity which requires us to look at the practices of the parties. Section 28.1(e) does not, in our view, effect such an amendment. It is our conclusion, having regard to the whole of Article 28, that while the parties were primarily intending by such Article to agree that the full-time employees in the terminal would not suffer a diminution of work because of the employment of part-time employees the Article goes beyond mere protection to a form of representation.

21. The union, in order to achieve the protection of full-time jobs/income, must necessarily negotiate as a part of the collective agreement clauses setting out what form the protection must take. Only in this way can there be a right to enforce these clauses through arbitration. Article 28 establishes that part-time employees cannot work prior to 5p.m. on any day (section 28.1(k)), must be employed as a “supplement” to the normal work force (section 28.1(a)) and not to deprive regular employees of their normal hours of work (section 28.1(f)). Laid-off regular employees and regular employees are to be used in preference to part-time employees (sections 28.1(c)(1), 28.1(c)(2), 28.1(g) and 28.1(f)). It is obvious that all of these sections are solely directed at protecting the full-time bargaining unit. However, Local 938 did not stop there. It proceeded to demand and receive undertakings that part-time employees would receive the same minimum scale as a regular employee and that the part-time employees would have deducted from their pay the amount equivalent to union dues and such monies would be forwarded to the union on a “checkoff form”. If the establishment of the wage rate for part-time employees had not been included in Article 28, would the full-time employees, present or future, have been any less protected? We must conclude that they would not have had less protection, because the other sections of Article 28 are clear that even if the company were able to pay part-time employees a bargain basement rate, their use would still be equally restricted vis-a-vis full-time employees. The requirement that minimum scale (for full time employees) be paid to part-time employees does not add to the protection of full-time employees. Similarly, the deduction of dues does not protect full-time employees. Why would Local 938 consider it should have them? The evidence indicates they were payment for the establishing of a fixed rate of remuneration which probably would be higher than any part-time employees could achieve in one-to-one bargaining. The deduction of union dues supports the union at least for the clout it had at the negotiating table. While we agree that most of Article 28 is devoted to protecting full-time employees, section 28.1(a) and section 28.1(e) are instances where the union can be seen to be negotiating on behalf of part-time employees, and being remunerated for this. Since the union was permitted to do this, the company thereby gave recognition to the union for this group. This fact situation and collective agreement are distinguishable from the *Canadian Red Cross Blood Transfusion Service* case where the Board found there was no *expansion* of the apparent representation rights, as set out in the recognition clause, caused by the inclusion in the collective agreement of a provision specifying that certain clauses of the collective agreement would be applicable to temporary employees after three months’ employment. This clause was included in the collective agreement after the union unsuccessfully tried to bargain for an expansion of the certified bargaining unit as a means of ensuring that the employer could not use temporary employees to the detriment of full-time employees or positions. While the clause did extend many of the terms of the collective agreement to temporary employees (including wage rates), the Board found that such extension did not amount to recognition by the employer or attachment of representation rights or duties because the clause was a compromise offered after the union’s broader recognition clause was rejected and because several important articles were not made applicable to temporary employees, i.e., the grievance procedure and arbitration clause and the mandatory check-off provision. It is notable that the hours of work for temporary employees (generally coincidental with full-time regular employees) meant that the union had to seek to protect the full-time employees from the extensive use of temporary employees by establishing a level of compensation identical with bargaining unit employees and not by the introduction of clauses giving full-time employees first refusal opportunities. Since the work was required during the same hours as the full-time employees’ normal work, these opportunities could be limited. Comparing the *Canadian Red Cross Blood Transfusion Service* situation with that at McNeil McGrath, it is clear that since employment of part-time employees

is restricted to after 5p.m., the normal quitting time of full-time employees, the requirement that certain wage rates had to be paid would not serve to provide any additional protection to laid-off employees or regular employees who want to work overtime or additional hours or to reduce the prospect that full-time positions might be lost as a result of the use of part-timers. All of that protection could be gained by negotiating Article 28 without sections 28.1(e) and 28.1(a). The inclusion of these sections has led us to conclude that part-time employees were intended to be encompassed within Local 938's jurisdiction.

22. Assuming without finding that there is ambiguity such that evidence of the parties' past practice becomes relevant, we heard evidence that part-time employees were never treated as forming part of the bargaining unit. We note, however, that the collective agreement we have before us is the same in all essential respects as the collective agreement which was the subject matter of a Canadian Labour Relations Board decision (see *Massicotte, supra*,) wherein that Board also concluded Local 938 owed a part-time employee a duty under the section of the *Canada Labour Code* comparable to section 68. This surely must be a significant event touching upon the parties' practice. Notwithstanding that decision (rendered January 28, 1980 which Local 938 appealed unsuccessfully to the Supreme Court of Canada – decision released May 31, 1982), the collective agreement before us was concluded in October of 1982, albeit with a different employer, leaving the key contentious provisions unchanged. We received no evidence as to any attempts by Local 938 to change the language. The only revision appears to have been in Article 28 with respect to the wage rates. If the parties wished to remove part-time employees from the bargaining unit and for Local 938 to make clear its intention not to represent part-timers, one would have expected some revision of the recognition clause and other language of the collective agreement to reflect this position. Whatever the "practice" of the parties to the collective agreement had been prior to the *Massicotte* decision, their conduct in the face of it is the most reliable indicator of their intentions. Having left it as it was prior to the decision of the C.L.R.B., we must conclude that the parties accepted that Local 938 was entitled to represent part-time employees as a part of the bargaining unit. Local 938 must accept its duty of fair representation along with such entitlement.

23. Having found that Local 938 owes the complainant a duty under section 68, the question becomes whether the duty has been breached. The Board has included within this duty a bargaining agent's negotiating activities (see, for example, *The Great Atlantic and Pacific Company Limited*, [1983] OLRB Rep. Oct. 1654 and cases cited therein at pp. 1664-1669; *Manor Cleaners Ltd.*, [1983] OLRB Rep. June 929; *Silverwood Dairies*, [1982] OLRB Rep. Aug. 1199), administration of the collective agreement (see, for example, *C.U.P.E. Local 1000*, [1975] OLRB Rep. May 444; *I.T.E. Industries*, [1980] OLRB Rep. July 1001) and treatment of the complaints of employees under the Act (see *Suzanne Hebert-Vaillant*, [1981] OLRB Rep. June 623). In this case the complainant claims that Local 938 should have consulted with him (and others in the part-time category) during the negotiation process leading up to the execution of the current collective agreement. We agree that a duty under section 68 must at least include a duty to consult at some point with those represented. We therefore find there has been a breach of section 68 in this instance. We do not hold the complainant responsible for his lack of participation in the negotiation process. He was advised by a steward of Local 938 in 1981 that he was not covered by the collective agreement and it is reasonable, in view of this, that he would not seek to participate in the negotiation of it. It is also likely that until he was dropped from the part-time list he would not have been motivated along these lines. Even if he had attempted to participate, Mr. Neal's evidence is clear on this point – he would have repelled such attempts. As a sequel to both the C.L.R.B. decision

and the Supreme Court of Canada decision in the *Massicotte* case. Local 938 had two choices available to it vis-a-vis part-time employees. It could either redraft the recognition clause, dropping the part-time employees from representation, or accept the representation rights as found by the C.L.R.B. It seems to us that if the second course is taken, there must be some communication with the part-time employees initiated by Local 938 preliminary to negotiations. This was not done and, indeed, Local 938 continued to regard part-time employees as not being “represented” by it. Therefore we find that the duty under section 68 has been breached insofar as Local 938 ignored the part-time employees in its preparations for bargaining.

24. Another negotiating fault alleged to be committed by Local 938 is that the “language of the collective agreement put part-time employees outside representation”. Although the meaning of this was never made clear, we took this submission to mean that Local 938 was wrong in not negotiating a clause that extended the grievance and arbitration procedure to part-time employees in the same way as to full-time employees. We cannot accept this contention. Firstly, section 28.1(h) of Article 28 provides that alleged violations of Article 28 can be submitted to grievance and arbitration. While it is true that this clause gives Local 938 carriage of such matter, this is the same condition that applies to grievances by full-time employees. The Canada Labour Relations Board found in *Massicotte*, *supra*, that Mr. Massicotte had wrongly not been afforded access to the grievance and arbitration machinery and, on that basis, ordered as a remedy resort to such procedure. Although the grievance and arbitration clauses of that collective agreement were not reproduced in the C.L.R.B. decision, if they were the same as Article 6 of the collective agreement before us, we cannot agree with this conclusion. On the facts before us, section 28.1(h) provides that violations of Article 28 will be grieved and arbitrated in accordance with Article 6 of the collective agreement. Article 6 applies to provisions affecting full-time employees (reproduced at page 9 above). The arbitration board which dealt with Mr. Massicotte’s grievance alleging unjust discharge found he had no *substantive* right to be discharged only for cause. Hence, while Mr. Massicotte gained access to arbitration as a result of the C.L.R.B.’s decision, it was ultimately determined that he was without the necessary *substantive* right necessary to give the arbitration board jurisdiction to consider his grievance (see *The Toronto Hydro-Electric System and C.U.P.E. Local 1* (1980), 29 O.R. (2d) 18 (Div. Ct.), *aff’d* (1980), 30 O.R. (2d) 64, leave to appeal to S.C.C. refused, 35 N.R. 210n and *Ontario Hydro*, *supra*, for an elaboration of the distinction within collective agreements between substantive and procedural rights). We find nothing wrong with that arbitration board’s reasoning and, looking at essentially the same collective agreement, we have come to the same conclusion. Therefore, we conclude that the language negotiated did not “put part-time employees outside representation”, if representation means negotiating a provision for grievances and arbitration regarding substantive rights negotiated, because Article 28, section 28.1(h) makes the provisions of Article 28 (the only provisions besides the recognition clause applicable to part-time employees) enforceable through the grievance and arbitration procedures in the same way as other provisions are enforceable through Article 6. The complainant really seems to be complaining that there is no substantive right clearly apparent in the collective agreement to have his termination (or removal from the part-time list) only occur for just cause, a protection enjoyed by full-time employees. We are not prepared to find that because no just cause clause was negotiated for him, there is a breach of section 68. The complainant himself, through counsel, acknowledged that negotiation of different levels of employment terms for different employees was not a breach of section 68. The Board also in interpreting section 68 as applied to bargaining has not found that hard bargaining choices and/or differential treatment of portions of the bargaining unit in and of themselves

amount to breaches of section 68 (see, for example, *James Mason, supra*; *Royal Ontario Museum, supra*; *Dufferin Aggregates, (Division of Dufferin Materials and Construction Ltd.) and Brewery Workers, Radenko Bukvich, et al.*, [1982] OLRB Rep. Jan. 35; *Corporation of the City of Toronto and Toronto Civic Workers Local 43, supra*; *Corporation of the City of Thunder Bay*, [1983] OLRB Rep. May 781). The complainant has failed to show how the failure to include this type of a clause applicable to part-time employees breaches section 68. Clauses become a part of a collective agreement as a result of demands by parties and, ultimately, agreement to their inclusion. It may well be that a just cause clause applicable to part-time employees would not have been demanded by Local 938 in bargaining because the full-time portion of the unit did not think it necessary or, even if demanded, the whole bargaining unit would not be willing to support it in the face of employer resistance or trade its acceptance for some other demand. We therefore cannot conclude that because a just cause clause was not negotiated for part-time employees, that *ipso facto* this was a breach of section 68. To do so would be to set in the abstract certain minimum conditions which must be negotiated for a bargaining unit by its bargaining agent. This is a path we are not prepared to take in these circumstances.

25. This brings us to the aspect of this application alleging wrongdoing by Local 938 in its administration of the collective agreement because it did not write a grievance for Mr. Vesik. This aspect requires an assessment of Local 938's conduct in administering the collective agreement as it stands. We find the duty Local 938 has under section 68 in this regard was not breached because it correctly assessed that Mr. Vesik had no substantive right to have his termination/cessation of employment arbitrated (let alone grieved). While the recognition clause (Article 1) appears to also describe to whom the provisions of the collective agreement apply, this is not so in view of Article 28, section 28.1(e). This section makes it clear that the only substantive provisions applicable to part-time employees are those in Article 28. Therefore, Local 938 was correct or, at least, was reasonable in its assessment that Article 3 did not apply to Mr. Vesik because it was consistent with the determination of the arbitration board's decision dealing with Mr. Massicotte's grievance.

26. We have also concluded that a breach of section 66 has also not been made out by the complainant because there is nothing unlawful in a trade union remaining in control of some or all of the grievance and arbitration procedure. Indeed, this is the norm in most collective agreements and contemplated by section 44 of the Act. We also cannot find within the collective agreement any clause that explicitly restricts or eliminates part-timers from becoming union members. Article 2 (Union Security) simply provides that union membership held by bargaining unit members must continue but that all non-members must have a dues check-off inclusive of the deduction of initiation fees after the completion of the probationary period. Presumably the payment of initiation fees leads to membership but all this does not mean part-timers are *prohibited* by the terms of the collective agreement from becoming members if they so choose. All Article 2 does, at most, is *require* membership in Local 938 by full-time employees after completion of the probationary period. It is not a restriction on the complainant's right to *choose* to become a member. In any event, we find that the complainant knew he was not a member of Local 938 as early as 1981 and he never sought to become a member. We find he was under no misguided belief that he was, through the checkoff deductions, becoming a member of the union. This issue is materially different from the issue of whether he thought he was covered by the collective agreement and would therefore be prompted to seek, through negotiations, to improve his terms and conditions of employment. Whether he could or could not become a member of Local 938 was something he could have pursued quite apart from

negotiations, immediately after discovering he did not hold membership in Local 938. We therefore are not disposed to deal with this aspect of his complaint because of the delay involved. Finally, “the failure to redraft sections 1.1 and 1.2 of Article 1 eliminating part-time employees” does not amount to a violation of section 66(b) because section 66(b) requires that there was an unlawful imposition of a condition of employment which seeks to restrain an employee “becoming a member of a trade union or exercising any other rights under this Act”. We cannot see how a failure to redraft this Article imposed any such condition on the complainant.

27. Insofar as requested remedies are concerned, all except the reinstatement request necessarily must fail because of our findings related to Local 938’s conduct in administering the collective agreement. Reinstatement presumably was requested in part to compensate the complainant for his lost opportunity to be consulted prior to or during bargaining. To grant reinstatement would amount to this Board rewriting the collective agreement so that there is a substantive right to continued employment except where there is just cause for termination and adjudicating upon such right. Even in instances where a collective agreement already includes a clause setting out a substantive right, the Board has stated that success in proving that section 68 has been breached in connection with it does not automatically confer on a complainant the right to have his grievance arbitrated (see, for example, *Massey-Ferguson*, [1977] OLRB Rep. Apr. 216; *Bedard Girard*, [1981] OLRB Rep. Oct. 1338). The Board has referred an issue to arbitration as a remedy for breaches of section 68 only where it is apparent that a fair-minded reconsideration by the union will be difficult, if not impossible (see *Leonard Murphy*, [1977] OLRB Rep. Mar. 146). This is the appropriate remedy in most instances because it permits adjudication of the substantive right which the union has ignored or mishandled in its administration of the collective agreement. In some cases the Board has referred the matter back for reconsideration by the union with arbitration being the ultimate resolution of the matter (see *Swing Stage Ltd.*, [1983] OLRB Rep. Nov. 1920). In no instance has the Board overstepped the arbitration process and adjudicated upon the substantive right the complainant claims to have been violated by his employer. This has never been done because a remedy granted under section 68 should not change the essential character of the grievance/arbitration process. Mr. Vesik, having failed to establish a breach of section 68 regarding that process, asks that a new substantive right be written into the collective agreement (a right which may not have been included in the collective agreement even if part-time employees had been consulted by Local 938) and that this right be adjudicated by the Board. We have not been persuaded to do this in these circumstances. Therefore all the requested remedies of the complainant are refused. This leaves open the question of how the breach we have found ought to be remedied. In view of the fact that the parties have not had an opportunity to specifically address this question, we will leave the formulation of how this breach ought to be rectified to the parties to the complaint.

28. The Board will remain seized of this issue and in the event the parties cannot reach a satisfactory solution, will reconvene to hear submissions as to what remedy is appropriate in the circumstances.

2878-83-R;2879-83-R Laundry and Linen Drivers and Industrial Workers Union, Local 847, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Applicant, v. **Creeds Storage Ltd.**, Respondent, v. Employee, Objector

Certification – Practice and Procedure – Union seeking all employee unit losing vote and having bar imposed – Subsequent applications for two smaller units filed by other union having affiliations with first union but with distinct identity – Whether Board exercising discretion to not entertain applications of affiliated union

BEFORE: M. G. Mitchnick, Vice-Chairman, and Board Members F. W. Murray and B. L. Armstrong.

APPEARANCES: *B. Fishbein for the applicant; Roy C. Filion, Peter J. Thorup, Jeremy Forgie, Jack Creed and Jim Gray for the respondent; no one for the objector.*

DECISION OF THE BOARD; May 3, 1984

1. These are two applications for certification, which the Board hereby consolidates.
2. There is no question but that the applicant Laundry and Linen Drivers and Industrial Workers Union, Local 847, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter referred to as "Local 847") has the status of a "trade union" within the meaning of section 1(1)(p) of the *Labour Relations Act*. That has been recognized in a lengthy series of cases of the Board granting certification to the applicant. The problem raised by the respondent is the applicant's apparent relationship to a second trade union and previous applicant, the Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351, (hereinafter referred to as "Local 351"). In view of this relationship, the respondent argues that the Board ought to refuse to entertain the instant application; alternatively, the respondent argues that the applicant ought to be estopped from claiming the bargaining units it now seeks as appropriate, or at least be required to justify them as being so.
3. Local 351 has also been certified by the Board in a long line of cases, most of them under its former name, Laundry, Dry Cleaning & Dye House Workers' International Union, Local 351. On February 3, 1984, Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 applied to the Board to be certified for a unit of "all employees" of the respondent in Metropolitan Toronto (Board File No. 2532-83-R). The employer agreed that that was the appropriate bargaining-unit description, and the Board, having regard to the parties' agreement, so found. The Board further found the applicant to be in a "vote" position, and directed the taking of a representation vote. The applicant lost that vote, and the Board, in accordance with its usual practice, imposed a bar against the applicant "with respect to any of the employees in the bargaining unit" for a period of six months from the date of the Board's decision. The representation vote itself took place on March 6th, and after the ballots were counted, Fernando da Silva, the representative present for the applicant, stated to the employer: "I'll be back with another one of our unions in 6 or 7 days".

4. On March 9, 1984, the present applications were filed by Local 847. They seek certification for two smaller units of employees of the respondent, namely, "all office staff and counter clerks", and "all drivers and drivers' helpers". Apart from the comment of Mr. da Silva, the applicant Local 847 is shown on its application as having the same address ("34 Madison Avenue, Toronto") as the applicant (Local 351) in the previous application. Counsel for the applicant acknowledges that both Local Unions are affiliates within the Teamster organization, and also acknowledged that some overlap may exist between the executive boards of the two unions, as well as amongst their staff representatives. Counsel submitted, however, that the specific details of that relationship are irrelevant under the Board's jurisprudence. Counsel also pointed out that the telephone number and individual signing this application are distinct from the previous application, and, in particular, that all of the membership evidence filed in support of the application is fresh evidence. The Board has now reviewed the membership evidence and confirmed that that is the case. In doing so, we have noted as well that the bulk of the new cards have been collected by the same individuals (including Mr. da Silva) as collected the previous cards.

5. Section 103(2)(i) provides:

103.-(2) Without limiting the generality of subsection (1), the Board has power,

- (i) to bar an unsuccessful applicant for any period not exceeding ten months from the date of the dismissal of the unsuccessful application, or to refuse to entertain a new application by an unsuccessful applicant or by any of the employees affected by an unsuccessful application or by any person or trade union representing such employees within any period not exceeding ten months from the date of the dismissal of the unsuccessful application.

In support of his position that the relationship between two *bona fide* trade unions is irrelevant to the Board in its application of section 103(2)(i), counsel relied specifically upon *Pinehill Auto Ltd.*, [1968] OLRB Rep. July 375; *Elmtree Nursing Home*, [1978] OLRB Rep. Nov. 984; and *Clorox Company of Canada Ltd.*, [1980] OLRB Rep. Feb. 184. Counsel for the respondent argued that these cases go no further than to establish that an already-imposed bar cannot be read as extending beyond the trade union named therein, and does not by its terms apply to any other trade union having a separate and distinct status under the Act. Counsel for the respondent points out that he is in this case placing in issue neither the status of the applicant as a "trade union" under the Act, nor the application of the earlier bar imposed specifically against Local 351; the issue now before the Board, he submits, is solely the question of whether the Board considers this an appropriate case to exercise the additional discretion given to it under section 103(2)(i), when *another* trade union applies for certification, of refusing to entertain that application.

6. In *Elmtree Nursing Home*, a bar was imposed against Local 204 of the Service Employees International Union after it lost a representation vote, and the International itself then applied for certification within the proscribed period of time. In *Clorox Company*, the "National" Brewery Workers Union lost a vote and had a bar imposed, and its Local 304 then brought the fresh application. In both cases the Board reviewed its earlier jurisprudence and

found it appropriate to entertain the subsequent applications. Both cases commented on the fact that the Board has traditionally viewed parent and local unions, or sister locals of the same parent union, as having a separate and distinct status under the *Labour Relations Act*, and this is particularly true with respect to the form of membership evidence which the Board has considered to be acceptable in an application for certification. Membership evidence in a local, for example, which does not clearly identify that local in contradistinction to any other local or its parent, has long been rejected by the Board. See *Beatrice Foods (Ontario) Ltd.*, [1977] OLRB Rep. Mar. 192; *Bernardin of Canada*, [1975] OLRB Rep. Oct. 737; *MacDonalds Consolidated Ltd.*, [1969] OLRB Rep. Aug. 634; *Beaver Foundation Ltd.*, [1967] OLRB Rep. Oct. 652; *Milson Floors Ltd.*, [1966] OLRB Rep. Sept. 419; *Swansea Construction Company Ltd.*, [1965] OLRB Rep. Mar. 645. The Board in both *Elmtree* and *Clorox* also was satisfied that no grounds existed for finding that employees would not have known they were signing a card in a different trade union the second time, notwithstanding the similarity in names and the involvement of the same organizers in both campaigns. While both cases do, as respondent counsel submits, make the finding that the two unions in question each enjoyed the status of a separate trade union under the Act, and that the bar imposed against one accordingly did not apply to the other, it is apparent from a fair reading of both cases that the Board then went beyond that narrow "bar" issue and considered other discretionary grounds for refusing to entertain the applications as well. In *Elmtree*, for example, the Board noted, on the "abuse of process" argument that the second applicant had not been brought into existence solely for the purpose of making the application before the Board. And in *Pinehill Auto Ltd.*, the earliest of the three cases relied upon by the applicant (and referred to in the other two), the second application was made by the General Truck Drivers' Union, Local 938 International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, following a bar being imposed against the Teamster affiliate which is the applicant in the present case, Local 847. The Board in that situation saw fit to entertain the second application, notwithstanding the explicit argument of the employer's counsel "that the Board should not entertain the instant application so soon after the dismissal of the earlier application ...". It cannot fairly be said, therefore, that the Board in the previous cases has failed to turn its mind *both* to the application of an existing bar, *and* to the obvious alternative ground of "refusing to entertain" a subsequent application, under the provisions of section 103(2)(i). Rather, the Board appears to have viewed the limitation it was placing on the effect of a bar as a logical extension of the separateness with which it insists membership evidence of one versus another local, or a local versus its parent, be viewed in other contexts.

7. That is not to say that the applicant trade union, whose apparent relationship to the previous applicant, and the persons through whom it acted, has not been rebutted, has not placed itself in a position of having to satisfy the Board of the appropriateness of the bargaining units which it now is seeking, as opposed to the bargaining unit which was sought and agreed upon in the prior application. Having regard to the representations of the parties, the Board appoints an officer to inquire into and report to the Board on the community of

interest which the office staff and counter clerks, and the drivers and drivers' helpers, share with the other employees of the respondent. At the same time, the officer is directed to inquire into and report to the Board on the duties and responsibilities of the dispatcher, Ernest Perry, if a dispute still exists between the parties as to his status.

1449-83-R Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen and International Union of Bricklayers and Allied Craftsmen, Local 2, Applicant, v. David Yan & Partner of Canada Limited and **David Yan Construction Ltd.**, Respondents

Bargaining Rights – Employer becoming member of employer association which subsequently enters into collective agreements with applicant union – Employer granting voluntary recognition in circumstances and bound by collective agreement

BEFORE: R. A. Furness, Vice-Chairman, and Board Members H. Kobryn and R. Swenor.

APPEARANCES: *B. Fishbein, J. Robbins and J. Zanussi for the applicant; Stanly D. Goldberg, Michael Granat and David Yan for the respondents.*

DECISION OF THE BOARD; May 28, 1984

1. The name of one of the respondents appearing in the style of cause as "David Yan Construction Limited" is amended to read: "David Yan Construction Ltd."
2. The applicant has applied to the Board under section 63 of the *Labour Relations Act* with respect to the bargaining rights of the applicant as a result of an alleged sale of a business by David Yan & Partner of Canada Limited to David Yan Construction Ltd. In the alternative, the applicant has alleged that the respondents should be treated as constituting one employer for the purposes of the Act in that, at all material times, they were carrying on associated or related activities or businesses under common control or direction within the meaning of section 1(4) of the Act.
3. It is the position of the applicant that David Yan Construction Ltd. or the respondents as one employer by virtue of section 1(4) of the Act, are bound by the provincial collective agreement between the International Union of Bricklayers and Allied Craftsmen and the Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen and the Masonry Employers' Council, effective from May 1, 1982, until April 30, 1984.
4. It is the position of David Yan Construction Ltd. ("Yan") that it is not bound by any collective agreement with the applicant and it further denies that the applicant has any bargaining rights (or ever had any bargaining rights) for employees of Yan. In the alternative, if it is found that bargaining rights once existed, it is the position of Yan that such bargaining rights have long since been abandoned. In the further alternative, Yan denies that it is or ever

was carrying on associated or related activities or businesses under common control and direction within the meaning of section 1(4) with David Yan & Partner of Canada Limited. ("Yan & Partner"). In the further alternative, it was the position of Yan that should the Board find that the respondents carried on associated or related activities or businesses under common control and direction within the meaning of section 1(4), then the Board ought not to make any such declaration because of the failure of the applicant to bring this application in a timely fashion. The respondents also adopted the position that there had not been a sale of a business under section 63 and that, in the alternative, even if a sale had taken place, the Board ought not to make a declaration under section 63 because of the delay involved in bringing this application.

5. The initial issue before the Board in this matter was the assertion by the applicant and the denial by Yan & Partner that the latter was bound by a collective agreement with the applicant. The first contact between Mr. Zanussi, a business agent of the applicant, and Yan & Partner arose as a result of Mr. Zanussi becoming aware in about 1975 of masonry work being performed on a job in the City of Toronto. After making enquiries, he ascertained that the general contractor on the job and the masonry contractor were not bound by collective agreements with the applicant. He arranged to meet a person whom he believed to be David Yan in 1975, and asked that person if Yan & Partner would consider signing a collective agreement with the applicant. The person believed to be Mr. David Yan said he would think it over and nothing more was heard on the matter.

6. In August, 1975, Yan & Partner sent an application for membership in the Toronto Construction Association together with a cheque in the amount of one hundred dollars. The application is neither dated nor signed. However, the cheque is signed and was received by the Toronto Construction Association. In a letter dated August 27, 1975, the director of labour relations of the General Contractors Section of the Toronto Construction Association wrote to Yan & Partner acknowledging receipt of its application and cheque regarding membership in the Toronto Construction Association General Contractors Section. The letter advised that the application for membership had been accepted and that the Building Trades Council of Toronto had been notified accordingly. According to the terms of the letter, Yan & Partner received at that time the 1975-76 membership directory and a copy of each of the Toronto Construction Association General Contractors Section's collective agreements with six trade unions, including the applicant. The letter invited Yan & Partner to take ten minutes out of their busy schedule to drop in at the Construction Centre for an informal discussion to cover the services offered and to ensure that they were getting full value for their dues.

7. On May 24, 1976, the General Contractors Section of the Toronto Construction Association and the applicant entered into a collective agreement. Attached to the collective agreement and bound by the collective agreement is a list of members of the General Contractors Section of the Toronto Construction Association. On that list is included the name of Yan & Partner. Paragraph three of the collective agreement states: "The attached list of Employers constitutes the General Contractors Section of the Toronto Construction Association".

8. Subsequent collective agreements were entered into which referred to Yan & Partner in a list attached to the collective agreements as members and former members. In a letter dated January 28, 1976, Yan & Partner notified the Toronto Construction Association of its change of address and in a letter dated January 20, 1978, Yan & Partner notified the chairman

of the General Contractors Section of the Toronto Construction Association that Yan & Partner had decided to resign its membership effective January 1, 1978.

9. The Board finds from the evidence before it that resignation of Yan & Partner was never communicated to the applicant, either by the General Contractors Section of the Toronto Construction Association or by Yan & Partner.

10. By virtue of the provisions of section 51(1) of the Act any collective agreement between the General Contractors Sector of the Toronto Construction Association (the "Association") and the applicant is binding upon the Association and each person who was a member of the Association at the time the collective agreement was entered into and on whose behalf the Association bargained with the applicant as if it was made between each of such persons and the applicant. If such person ceases to be a member of the Association during the term of operation of the collective agreement, he shall, for the remainder of the term of the operation of the collective agreement, be deemed to be a party to a like agreement with the applicant. Section 51(2) provides for a duty of disclosure when the Association commences to bargain with the applicant. It is required to deliver to the applicant a list of the names of the employees on whose behalf it is bargaining and, in default of so doing, it shall be deemed to bargain for all members of the Association for whose employees the applicant is entitled to bargain and to make a collective agreement at that time, except an employer who, either by himself or through the Association, has notified a trade union in writing before the collective agreement was entered into that it would not be bound by a collective agreement between the Association and the trade union.

11. In *Great Lakes Fabricating*, [1982] OLRB Rep. June 872 and in *Baker Gurney & McLaren Ltd.*, [1976] OLRB Rep. March 78, the Board considered similar situations where an employer had joined an employers' organization which was bargaining with various trade unions. In those cases employers had joined employers' organizations. In *Baker Gurney & McLaren Ltd.*, *supra*, the Board found that by joining an employers' organization and authorizing it to sign a collective agreement on its behalf an employer had through its agent voluntarily recognized the trade union as the exclusive bargaining agent for certain of its employees. In *Great Lakes Fabricating*, *supra*, the Board found that pursuant to the provisions of a by-law, an employers' organization was enabled to bargain on behalf of an employer who had become a member of the employers' organization. In the instant case, the constitution of the Association provides that its objects are, *inter alia*, to represent members and to enter into agreements respecting wages and all other matters as may appear to be in the best interest of the construction industry. The constitution of the Association also provides for the negotiation of agreements, for signing them and for ratification.

12. Yan & Partner became bound by a collective agreement with the applicant because it joined the Association which subsequently entered into a collective agreement on its behalf. By this process, bargaining rights arose as a result of voluntary recognition of the applicant by Yan & Partner. Thereafter, successive collective agreements were entered into which were binding on the applicant and Yan & Partner by virtue of the provisions of section 51 and the lack of any notice of any change in circumstances to the applicant.

13. It appears clear that the Toronto Construction Association accepted the application for membership and the failure of Yan & Partner to actually sign and date the application is not determinative. The application was accompanied by a signed cheque and was accepted by

the Toronto Construction Association. Thereafter, as evidenced by the notification of change of address, Yan & Partner clearly intended to join the Toronto Construction Association and behaved until January of 1978, as if it was a member of the Toronto Construction Association. Yan & Partner argued that there was no evidence that Yan & Partner had seen the constitution or had seen the collective agreements referred to in the letter of August 27, 1975. Yan & Partner also pointed out that there was no evidence that Yan & Partner had ever lived up to the collective agreement and referred to section 16 of the constitution that applications for membership shall be signed by the applicant.

14. The fact that the evidence is not as complete as might be desired is, in large part, due to the fact that David Yan, who was present at the hearing, did not give evidence before the Board. There was no evidence before the Board from Yan & Partner about the constitution. Clearly the Association was satisfied and accepted Yan & Partner into membership. On the balance of probabilities the Board is satisfied that Yan & Partner was aware of the significance of becoming members of the Association. In these circumstances, the Board is denied the opportunity to examine evidence of Mr. Yan with respect to the dispute over bargaining rights in this application. Similarly, there is no evidence before the Board as to whether Yan & Partner did or did not employ employees under the various collective agreements through the Association. Yan & Partner may, of course, have employed persons under the various collective agreements unknown to the Association or the various trade unions. There is no way of knowing on the evidence before the Board. Similarly, the fact that an employer may disregard a collective agreement and remain undetected is not, of course, a ground for finding that a trade union does not have bargaining rights or that bargaining rights have been abandoned. Yan & Partner became bound by a series of collective agreements and in 1978, by virtue of the provisions of sections 145(3) and 147(2) of the Act, became bound by the first and subsequent collective agreements in the industrial, commercial and institutional sector of the construction industry.

15. The Board accordingly finds that the applicant and Yan & Partner are bound by the current industrial, commercial and institutional collective agreement and the Registrar is directed to list this matter for continuation of hearing.

1398-83-R;1399-83-R;1503-83-M International Brotherhood of Electrical Workers, Local 1687, Applicant, v. **F. D. V. Construction Ltd.**, Bluebird Construction Company, 556631 Ontario Limited, carrying on business as G. P. Construction, Respondents, v. The Electrical Trade Bargaining Agency of the Electrical Contractors Association of Ontario, Intervener

Collective Agreement – Construction Industry – Practice and Procedure – Agreement entered into when no employees at work – Not constituting collective agreement because of employer support – No evidence of actual supply or ability to supply members pursuant to agreement – Not coming within *Nicholls-Radtke* exception – Union denied status at hearing – Board not adjourning proceedings to permit court challenge of Board ruling in Courts

BEFORE: R. A. Furness, Vice-Chairman, and Board Members W. F. Rutherford and W. H. Wightman.

APPEARANCES: *Michael Mitchell, Steven Barrett, Lou Popovich and Gary Bouchard for the applicant; Raimo T. Heikkila for F. D. V. Construction Ltd. and Bluebird Construction Company; L. Girones and G. R. Pope for G. P. Construction; and Alex Ahee and Michael Zangari for United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 800.*

DECISION OF THE BOARD; May 8, 1984

1. The applicant is seeking relief with respect to sections 1(4) and 63 of the *Labour Relations Act*, and has also filed a grievance under the provisions of section 124 of the Act. In a decision of a differently constituted panel of the Board, the Board ruled that while it refused to grant the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 800 ("Local 800") status in any of these three applications, it provided for notice to be given to Local 800 so that it might on a subsequent occasion attempt to prove its status.

2. At the continuation of hearing before the present panel, Local 800 adduced evidence with respect to its claim to have status to intervene in these proceedings by reason of the existence of certain bargaining rights. Local 800 relied upon a document entitled "Maintenance Agreement" between itself and F. D. V. Construction Ltd. Under the terms of this collective agreement, F. D. V. Construction Ltd. recognized Local 800 as the sole bargaining agent for all employees involved in maintenance, repair and renovation work, excluding those above the rank of general foreman. The Board heard evidence with respect to the execution of this document. The document was apparently executed on November 2, 1982. Although there is some difference in the testimony between William Moffat who signed on behalf of F. D. V. Construction Ltd. and Michael Zangari, the business agent of Local 800, who gave evidence surrounding the execution of the document, the document appears to have been signed initially on behalf of Local 800. It was the position of Local 800 that J. R. St. Eloi, the Canadian Director of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, initially executed a document which was then presented to F. D. V. Construction Ltd. to sign.

3. F. D. V. Construction Ltd. is engaged in maintenance repair and renovation work

in the Timmins area of Ontario. It has been faced with competition from employers who use non-union labour. Local 800 and F. D. V. Construction Ltd. in order to provide competitive rates to compete with non-union labour, signed the maintenance agreement with respect to all employees involved in maintenance repair and renovation work. Prior to the signing of the maintenance agreement, Mr. Zangari and Mr. Moffat, the general president of F. D. V. Construction Ltd., had had meetings with representatives of the millwrights, ironworkers and carpenters to see if an acceptable agreement could be reached. It appears that the ironworkers and electricians were unwilling to be a part of this agreement. Moreover, initially the Carpenters' union refused to be a part of this agreement, but subsequently entered into a separate collective agreement which provided for even more favourable rates to F. D. V. Construction Ltd., than the rates provided under the maintenance agreement under consideration.

4. At the time the maintenance agreement was signed, Local 800 did not have any members working for F. D. V. Construction Ltd. Subsequently, it provided plumbers, labourers and other persons for maintenance work performed by F. D. V. Construction Ltd. for Kidd Creek Mines in the Timmins area. The maintenance agreement has no fewer than twenty-eight modifications to it which have been initialled by the signatory for F. D. V. Construction Ltd., but apparently have not been initialled by Mr. St. Elói. Initially, office and clerical staff were covered by the agreement. Subsequently, their coverage from the agreement was deleted by striking out "office and clerical staff" and having it initialled by the signatory for F. D. V. Construction Ltd. It was the evidence before the Board that while the carpenters were initially covered by this maintenance agreement, they were subsequently no longer covered by the maintenance agreement after they entered into their own collective agreement.

5. At the time the maintenance agreement was entered into, there were no employees at work. Moreover, the maintenance agreement purports to cover all employees for maintenance work. Local 800, from the evidence, was not able and did not supply electricians since 1978. The question arises whether under these circumstances Local 800 has received support from F. D. V. Construction Ltd. so as to cause the maintenance agreement not to be a collective agreement by virtue of the provisions of section 48(a) of the *Labour Relations Act*. That section provides that an agreement between an employer and a trade union shall be the *Labour Relations Act* if the employer participated in the formation or administration of the trade union or if the employer contributed financial or other support to the trade union. In earlier decisions of the Board in *Sunrise Paving*, 72 CLLC ¶16,060, and in *C. Strauss (1979) Limited*, [1975] OLRB Rep. July 581, the Board took the position that the collective agreement which was signed when there were no employees at work was not a collective agreement by virtue of the provisions of section 48(a) of the Act because an employer is in these circumstances had contributed other support to the union. Subsequently, in *Nicholls Radtke & Associates Limited*, [1982] OLRB Rep. July 1028, the Board made an exception to this position where a trade union had entered into an agreement and had shortly thereafter supplied employees pursuant to that collective agreement who were members of that trade union. This decision was followed in *M. J. Guthrie Construction Limited*, [1984] OLRB Rep. Jan. 50. The issue arises whether in the circumstances of the signing of the maintenance agreement the Board ought to follow the *Sunrise Paving* and *Strauss* line of decisions or whether it ought to follow the *Nicholls-Radtke* and *M. J. Guthrie* line of decisions. At the hearing the Board ruled orally that the maintenance agreement is not a collective agreement because of employer support within the meaning of section 48(a) of the Act and that the facts were closer to the *Sunrise Paving* decision than to *Nicholls-Radtke*. In doing so, the Board declared that Local 800 did not have status to participate in the section 1(4) and section 63 proceedings based

upon such an alleged collective agreement. At the hearing, Board Member Wightman reserved his decision with respect to this ruling. The Board now sets forth its reasons for finding that the maintenance agreement between Local 800 and F. D. V. Construction Ltd. is not a collective agreement under the *Labour Relations Act*.

6. The facts in the instance case are closer to the *Sunrise Paving* decision because there was no evidence before the Board in the instant case that Local 800 in fact supplied or was unable to supply electricians or trades other than plumbers pursuant to this maintenance agreement who were members of Local 800.

7. In the *Nicholls-Radtke* decision, the Board found that the trade union involved provided its members to work for the employer who was bound by the collective agreement shortly after entering into the collective agreement. In the instant case, Local 800 has not satisfied the Board that it supplied all persons pursuant to the maintenance agreement who were in fact members of Local 800. As stated earlier, with respect to electricians, there was nothing in the evidence to indicate that there were any electricians who were ever members of Local 800, either at the time of the signing of the maintenance agreement or who were subsequently provided pursuant to the maintenance agreement. In these circumstances, it is F.D.V. Construction Ltd. who has selected Local 800 as the bargaining agent for its future employees, including future electricians and other trades who are not members of the applicant. In these circumstances, F.D.V. Construction Ltd. has given support to Local 800 within the meaning of section 48(a).

8. Upon hearing the decision with respect to denying its status due to the Board's finding that the maintenance agreement was not a collective agreement under the *Labour Relations Act*, Local 800 requested the Board to stand down while it challenged the Board's decision in the courts. In this request Local 800 was supported by the respondents. The applicant urged the Board to continue with the hearing and argued that for the Board to adjourn these proceedings would cause it prejudice and irreparable damage.

9. The Board heard argument with respect to the prejudice which would be suffered by the various parties to this proceeding and Local 800. The Board after hearing the representations of the parties declined to adjourn the proceedings and stated that it would give reasons in writing. It is the argument of Local 800 that the Board's decision struck at its plans for Ontario in that it was seeking to represent all maintenance workers in Ontario in a manner similar to the way it represented all maintenance workers in Alberta. It was the position of the applicant that the potential damages it was suffering are escalating and that on the balance of convenience rule, it was entitled to have these damages quantified and to have an interpretation of the terms of its collective agreement in terms of its relationship with the respondents. It was also the position of the applicant that witnesses upon which it relied would not be available in distant future proceedings. The respondents also argued in support of the position of Local 800 that they would be prejudiced in having a ruling by the Board which might be reversed in the event that the court ruled against the Board's decision not to adjourn the hearing.

10. It is not uncommon for parties to seek status to participate in proceedings before the Board and the Board regularly has to rule upon such recognition for status. In effect, the Board is being asked to set a precedent that whenever a party is denied status it should immediately discontinue the hearing, adjourn and wait until a court determines the issue of status

upon argument before it. The Board is not satisfied that there would be intolerable inconvenience to Local 800 in not adjourning the proceeding. On the other hand, the applicant is suffering prejudice and the potential for the loss of the evidence of witnesses who are now to give evidence before the Board with respect to its claims against the respondents. With respect to the respondents, the Board is not satisfied that they would suffer prejudice and irreparable harm. It must be remembered that the claim for damages against the respondents is escalating and it is in the best interests, in our opinion, for the respondents to know the extent of their liability and the interpretation of the collective agreements.

11. The Board has on many occasions declined to adjourn the proceedings when asked to adjourn the proceedings by a party that wishes to challenge a decision of the Board. See, for example, *Chrysler Canada Ltd.*, [1975] OLRB Rep. Sept. 699, *Windsor Airline Limousine Services Limited*, [1980] OLRB Rep. Feb. 272, and *Four B Manufacturing Ltd.*, [1978] OLRB Rep. Sept. 829.

12. In *Cedarvale Tree Services Ltd. v. Labourers' International Union of North America, Local 183*, (1971), 71 CLLC ¶14,087, the Ontario Court of Appeal said at page 383:

It is also clear law that such a tribunal is not required to bring its proceedings to a halt merely because it has been served with a notice of motion for an order of certiorari or prohibition. It is entitled, if it thinks fit, to carry its pending proceedings forward until such time as an order of the court has actually been made prohibiting its further activity or quashing some other order already made by which it assumed jurisdiction.

In the instant case the Board has not been served. Similarly, in *Re Flamboro Downs Holdings Ltd. and Teamsters Local 879*, (1979) 24 O.R. (2d) 400, at page 404, the Divisional Court stated:

Clearly, an administrative tribunal such as the Labour Relations Board is entitled to determine its own practices and procedures. Whether in a given case an adjournment should or should not be granted is a matter to be determined by the Board charged as it is with the responsibility of administering a comprehensive statute regulating labour relations. In the administration of that statute, the Board is required to make many determinations of both fact and of law and to exercise its discretion in a variety of situations. In the case of requests for adjournment, it is manifestly in the best position to decide whether, having regard to the nature of the substantive application before it, the adjournment should be granted or whether the interests of the employer, the employees or the union who, as the case may be, oppose the adjournment should prevail over the parties seeking it. As a matter of jurisdiction, it is for the Board to decide whether it should adjourn proceedings before it and in what circumstances.

The Board is satisfied on the balance of convenience that the applicant's position is more susceptible to prejudice caused by delaying the proceedings than the position of the respondents or Local 800.

13. Having regard to the balance of convenience which, in our view, is clearly in favour of continuing with these proceedings before the Board, the Registrar is directed to list the case for continuation of hearing.

2980-83-R;2981-83-U;3046-83-U;3121-83-U;3122-83-U United Food and Commercial Workers International Union, AFL-CIO-CLC, Applicant, v. **Imperial Flavours Inc.**, Respondent, v. Group of Employees, Objectors

Certification – Membership Evidence – Practice and Procedure – Trade Union Status – Cards in International's name but local named as applicant in error – Board consenting to name amendment – Adjourning hearing and reprocessing application in International's name – Second form 9 filed on behalf of International – Not causing Board to refuse reliance on form 9 – UFCW International Union having union status

BEFORE: N. B. Satterfield, Vice-Chairman and Board Members A. Grant and L. Collins.

APPEARANCES: *Michael Fraser and Freeman Budsell for the applicant/complainant; Steward D. Saxe, Van Miller and David Cote for the respondent; Steve Penny for the objectors.*

DECISION OF THE BOARD; May 7, 1984

1. The Board hereby directs that the above application/complaints be and the same are hereby consolidated for the reasons set out below.

2. Board Files Nos. 2981-83-U, 3046-83-U, 3121-83-U and 3122-83-U are complaints filed under section 89 of the *Labour Relations Act* alleging that the respondent has violated sections 64 and 66(a) of the Act. The complainant and respondent are agreed that the complaints in Board Files No. 3121-83-U and 3122-83-U are duplicates of the other two complaints. Therefore, the proceedings in Board Files No. 3121-83-U and 3122-83-U are hereby terminated.

3. For the reasons set out below, the Board finds that the applicant/complainant is a trade union within the meaning of section 1(1)(p) of the Act.

4. Prior to consolidating the application and complaints, the Board heard the representations of the parties on whether the application for certification was properly before the Board. The application was originally filed in the name of the Retail, Commercial and Industrial Union, Local 206 ("Local 206") and was listed for hearing on April 6th, 1984. On April 5th the Board received a request by telex to amend the name of the applicant to United Food and Commercial Workers International Union AFL-CIO-CLC. The Board consented to the amendment as requested, cancelled the hearing scheduled for April 6th, extended the terminal date for the application and reprocessed it. Revised notices showing the United Food and Commercial Workers International Union ("the UFCW") to be the applicant. The respondent filed a new reply and the UFCW filed a new Form 9 "Declaration Concerning Membership Documents before the Ontario Labour Relations Board". The amended application

was listed for hearing April 27th, 1984. It did not get before the Board on that date and, therefore, was joined with the four section 89 complaints which had already been scheduled for hearing on May 1, 1984.

5. When the application came before the Board on May 1, respondent counsel moved that the application be dismissed without hearing because the Board's action of cancelling the April 6th hearing, consenting to the request to amend the name of the applicant, reprocessing the application and listing it for hearing on another date had the same effect as adjourning a proceeding before the Board and rescheduling it for hearing on another date. Counsel advised the Board that, when he was informed on April 5th by the Registrar that the April 6th hearing was cancelled because a request for leave to amend the name of the applicant had been granted and it would be necessary to reprocess the application, counsel informed the Registrar that the respondent was not prepared to give its consent. Counsel argued that it is the Board's longstanding policy to refuse requests for adjournments of proceedings before it absent consent of all parties to the proceedings, except where the circumstances giving rise to the request are beyond the control of the requesting party and the adjournment would not cause substantial prejudice to the parties to the proceedings. Consequently, when the Board proceeded as it did with the amendment of the name of the applicant and the rescheduling of the April 6th hearing without the respondent's consent to an adjournment of the April 6th hearing, it acted contrary to its longstanding policy with respect to adjournments.

6. The Board heard and considered the full submissions of the parties on respondent counsel's motion and rendered the following ruling of a majority of the Board, Board Member Grant dissenting, which it hereby confirms.

Respondent counsel's motion amounts to a request for the Board to reconsider and revoke a decision made administratively with respect to the processing of this application. That decision was to grant the request to amend the name of the applicant from Retail, Commercial and Industrial Union, Local 206 to United Food and Commercial Workers International Union and to reprocess the application in that name [and in the manner described in paragraph 4 above]. The result of granting the respondent's motion would be to undo those steps, which is what the respondent is requesting the Board to do. That, counsel submits, would cause the Board also to dismiss the application.

As matters stand today, the employees and the respondent have received notice of the application in the name of the United Food and Commercial Workers International Union. The only prejudice to the respondent until this hearing has been the lack of opportunity to argue before the Board that it should not have consented to the request to amend the application, which consent resulted in the cancellation of the April 6th hearing and the reprocessing of the application. The respondent has now had an opportunity to make its argument to the Board. Were the Board to grant the motion argued by respondent counsel, there would be substantial prejudice to the applicant. On the other hand, the Board is satisfied that there would be no substantial prejudice to the respondent or to the objectors by proceeding with the application today.

For these reasons, the motion is dismissed.

7. Since the Board had ruled that it would hear the application for certification, the parties agreed that the application and the four complaints should be consolidated for purposes of hearing the evidence and argument with respect to all files. The applicant/complainant and counsel for the respondent agreed that the complaints included in Board Files No. 3121-83-U and 3122-83-U duplicate the complaints in the other two files. Consequently, the Board ruled that the proceedings with respect to Board Files No. 3121-83-U and 3122-83-U are terminated.

8. Respondent counsel had notified the Board at the time it made the motion that the application for certification was not properly before the Board that it had further preliminary representations to make with respect to the application should the Board deny the motion. Accordingly, the Board heard the representations of the parties on these further preliminary issues. The issues are:

- (1) The application should be dismissed because the Board's file did not contain a certificate of status showing that the applicant was a trade union within the meaning of section 1(1)(p) of the Act and only a trade union within the meaning of that section can make an application for certification.
- (2) The Board, in the circumstances of this application, should place no reliance on the Form 9 "Declaration Concerning Membership Documents before the Ontario Labour Relations Board" filed in support of the application and, therefore, should place no reliance on the membership evidence filed by the applicant and should dismiss the application.

The Board heard the submissions of the parties and reserved its decision on both issues, pending an opportunity for the Board to review its jurisprudence with respect to the argument that the Board should not rely on the applicant's membership evidence.

9. With respect to the issue of whether the applicant is a trade union within the meaning of section 1(1)(p) of the Act, the Board does not intend to set out the submissions of the parties except to say that respondent counsel argued that the parties had met with a Board Officer when the application did not proceed to hearing on April 27th. In the course of the meeting, they were advised that the file did not contain the usual record showing that there was on file with the Board a certificate of trade union status signed by the Registrar attesting that the applicant was a trade union within the meaning of section 1(1)(p) of the Act. On being advised by the Board as constituted herein that the file did not contain that record, respondent counsel contended that the UFCW lacked status to bring this application. The UFCW contended that it had appeared before the Board in numerous proceedings and was a trade union within the meaning of the Act. There is on file with the Board and signed by the Registrar a certificate attesting to the fact that the UFCW has been found in prior proceedings before the Board to be a trade union. Therefore, pursuant to section 105 of the Act, the Board finds that the United Food and Commercial Workers International Union AFL-CIO-CLC is a trade union within the meaning of section 1(1)(p) of the Act.

10. With respect to the Form 9, respondent counsel argues that, because of the hearsay nature of membership evidence in an application for certification and the requirements of section 111(1) of the Act with respect to secrecy as to union membership, it is the Board's policy not to allow membership evidence to be subjected to examination by other parties to an application for certification in the ordinary course of proceedings. As a result, the Board sets high standards for membership documents and places great reliance on the Form 9 accompanying those documents, particularly the declaration contained in paragraph 3 of the form. The respondents to applications for certification rely on the Board's standards, counsel asserts, in order to feel some assurance that the membership evidence is reliable on its face. That cannot be the case here, counsel argues, because when the UFCW official made the declaration contained in the Form 9 accompanying the application in the name of Local 206, the original applicant, the declaration was with respect to an application for certification by Local 206 and membership applications for the UFCW. This declaration was followed by a new Form 9 filed with respect to the application for certification by UFCW and with respect to the same membership cards. Since the two applicants are separate trade union entities under the Act, counsel submits, it is obvious that the officials of the trade unions who signed the Form 9's have done so automatically and without making the kind of enquiry which the declaration in paragraph 3 of Form 9 speaks to. If, indeed, the Officer who filed the first Form 9 did make a proper enquiry, then it follows that the second one was filled out without making the proper enquiry. These circumstances, counsel argues, cast doubt on which Form 9 is reliable and the Board should not place any reliance on either one.

11. The applicant's position is simply that a *bona fide* error was made in the name of the applicant on the original application and it carried through to all forms, including the Form 9 filed with that application. When the applicant realized its error it sought to correct it. When the Board consented to the request to amend the name of the applicant by extending the terminal date and reprocessing the application, it sent a new, blank Form 9 to the applicant to be completed. The UFCW complied by filing a new Form 9 showing it as the applicant in the proceeding. Having done so, it should not now be in a position where the reliability of the declaration contained in paragraph 3 of the second Form 9 should be questioned.

12. Paragraph 3 of Form 9 states as follows:

3. **(Where the documentary evidence consists in part of receipts or other acknowledgements of the payment on account of dues or initiation fees.)** On the basis of personal knowledge and enquiries that I have made, I state that the persons whose names appear on the receipts or other acknowledgements of the payment on account of dues or initiation fees are the persons who actually collected the moneys paid on account of dues or initiation fees and that each member, on whose behalf a receipt or an acknowledgement of payment is submitted has personally paid in money the amount shown thereon on his own behalf to the person whose name appears on his receipt or acknowledgement of payment as collector, EXCEPT IN THE FOLLOWING INSTANCES:

The first Form 9 named Local 206 as the applicant in its style of cause and it was signed by a person purporting to be an official of Local 206. The second Form 9 named the UFCW as the applicant in its style of cause and was signed by a different person purporting to be

an official of the UFCW. The Board's decision in *Kitchener News Company Limited*, [1980] OLRB Rep. Nov. 1656, one of two authorities to which respondent counsel referred the Board, describes the purpose of Form 9 in the following terms:

7. ... The purpose of the [Form 9] inquiry (and the "second check" that it builds into the system) is equally clear. The Board must place total reliance on documentary evidence – written hearsay, often solicited by inexperienced laymen, yet not revealed to the employer or subject to cross-examination (see [section 111] of the Act). On the basis of that evidence, a trade union may be certified as the employees' bargaining agent without recourse to a representation vote. Indeed, unless some specific irregularity is brought to the Board's attention, the Board will normally place total reliance on the [Form 9] Declaration and will not undertake any formal inquiry concerning membership documents which appear to be regular on their face. In the present case, for example, the [Form 9] problem would never have come to light had it not been for the disclosure of an irregularity which would not have been apparent on the face of either the [Form 9] Declaration or the membership card itself. To avoid such problems, the Board has always held that the person signing the [Form 9] must be meticulous and comply strictly with the requirements.

The ultimate purpose of Form 9 is to provide some evidence to the Board, albeit hearsay, in the form of a statutory declaration, that the membership cards filed with the application satisfy the statutory requirements for written membership evidence as specified by section 1(1)(l) of the Act and section 73 of the Regulations. The Board can then ascertain whether the applicant has the requisite membership support by examining the membership cards filed. If there are obvious errors on the face of the cards, such as there was with respect to the application made in name of Local 206, or where the cards fail to reveal the payment of at least one dollar, the Board is in a position to immediately discount those membership documents. The validity of the employees' signatures is verified from specimen signatures which the respondent to an application is required to provide to the Board. These checks can be made without the Form 9 declaration. On the other hand, those elements of the membership evidence which are of a hearsay nature, for example, the payment and collection of at least one dollar on account of dues or initiation fees, are not amenable to independent verification by the Board through simply examining the face of the documents. If the Board accepts the information at face value and it is incorrect, whether willfully or carelessly so, it would mislead the Board with respect to whether the applicant has the requisite membership support for its application to be successful. The declaration in paragraph 3 of the Form 9 by a responsible official of the applicant gives the Board some further assurance that it can safely rely on the membership evidence.

13. The Form 9 filed with respect to the applicant, United Food and Commercial Workers International Union, does correctly identify that trade union as the applicant in the proceedings and is consistent with the name of the trade union on the membership cards filed with the application. The Board notes that, had the Local 206 requested leave to withdraw its application, instead of to amend the name of the applicant, and a new application was subsequently filed by the UFCW relying on some or all of the same membership cards, the Board's Rules of Practice would have required the filing of a new Form 9, exactly as the

UFCW did here. There is nothing in the body of the Form 9, and particularly in the paragraph 3 declaration, that specifically requires the declarant to enquire as to the correct name of the applicant. The Board would not have been prepared to imply that there is a fault in the Form 9 declaration filed by the UFCW because of the "fault" in the name of the applicant in the first Form 9. Similarly, the Board is not prepared to imply any fault in the new Form 9 filed as a result of the reprocessing of the application. There are no allegations before the Board which would cause it to enquire into the Form 9 and there are no allegations of improprieties with respect to the membership evidence itself insofar as the payment and collection of at least one dollar on account of dues or initiation fees. Therefore, there is no reason for the Board not to rely on the membership cards filed with this application.

14. In all of these circumstances, the Board will proceed to hear this application for certification consolidated with the hearing into the two complaints under section 89 of the Act when these matters resume for hearing on Tuesday May 8th, 1984.

1626-83-R Stephen Rath, Applicant, v. Teamsters Union Local 141, Respondent, v. Inter City Papers Limited, Intervener

Collective Agreement – Termination – Timeliness – Memorandum of agreement constituting collective agreement – Parties purporting to enter into subsequent collective agreement with different term of duration – Alteration of duration ineffective – Timeliness of termination application governed by term specified in first document

BEFORE: N. B. Satterfield, Vice-Chairman and Board Members J. W. Murray and S. Cooke.

APPEARANCES: Stephen Rath and Wm. M. Richards for the applicant; Lewis Gottheil, Everett Winegarten, Brian Nickerson and Mark Hancox for the respondent; Brenda Bowlby, Andrew Shields and William Thompson for the intervener.

DECISION OF N. B. SATTERFIELD, VICE-CHAIRMAN AND BOARD MEMBER J. W. MURRAY; May 8, 1984

1. This is an application made pursuant to section 57 of the *Labour Relations Act* for a declaration terminating the bargaining rights of Teamsters Union Local 141 ("Local 141"). The relevant parts of section 57 for purposes of this application are subsection 2 clause (a) and subsection 3 which provide as follows:

57.-(2) Any of the employees in the bargaining unit defined in a collective agreement may, subject to section 61, apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit,

(a) in the case of a collective agreement for a term of not more than three years, only after the commencement of the last two months of its operation;

• • • •

(3) Upon an application under subsection (1) or (2), the Board shall ascertain the number of employees in the bargaining unit at the time the application was made and whether not less than 45 per cent of the employees in the bargaining unit have voluntarily signified in writing at such time as is determined under clause 103(2)(j) that they no longer wish to be represented by the trade union, and, if not less than 45 per cent have so signified, the Board shall, by a representation vote, satisfy itself that a majority of the employees desire that the right of the trade union to bargain on their behalf be terminated.

2. The applicant, Stephen Rath, had filed a similar application prior to this one which had been dismissed by the Board as untimely. In this respect, see the Board's decision which issued October 12th, 1983 in Board File No. 1242-83-R. No issue of timeliness was raised with respect to the instant application prior to the commencement of the hearing into it. During the hearing, however, a collective agreement between Local 141 and Inter City Papers Limited, London Division was proffered to the Board. The agreement, on its face, was for a term of less than one year. The application of section 52(1) of the Act, which stipulates that a collective agreement which provides for a term of operation of less than one year be deemed to provide for its operation for a term of one year from the date that it commenced to operate, would cause the application to be untimely. The Board, for that reason, heard the evidence and representations of the parties with respect to that issue. The Board found that, prior to the signing of the collective agreement, the parties had entered into a memorandum of agreement which provided for a term of operation of the collective agreement different from the one appearing on the face of the collective agreement. The Board further found that the memorandum of agreement constituted a collective agreement within the meaning of section 1(1)(e) of the Act. While section 52(5) of the Act allows the parties to a collective agreement to revise its terms at any time by mutual consent, the section prohibits revisions to the agreement's term of operation. Therefore, to the extent that the document proffered to the Board as a collective agreement differs from the memorandum of agreement by the mutual consent of the parties, it cannot differ with respect to its term of operation. The Board ruled, therefore, that the term of operation of the collective agreement relevant to this application was the term set out in the Memorandum of Agreement between the employer and Local 141. Accordingly, the Board found the application had been filed during the last two months of operation of the agreement and was timely.

[Review of evidence relating to petition omitted]

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14. In all of the foregoing circumstances the Board is prepared to accept the petition filed in support of this application as voluntary signification by the employees who signed it that they no longer wish to be represented by Teamsters Union Local 141.

15. The Board is satisfied on the basis of all the evidence before it that not less than forty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on October 31, 1983, the terminal date

section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

16. The Board directs that a representation vote be taken of the employees of Inter City Papers Limited. Those eligible to vote are all employees of Inter City Papers Limited at 1505 Sise Rd. in the City of London and at any other address within the City of London to which this operation may be moved, save and except foreman, persons above the rank of foreman, office and sales staff and students employed during the school vacation period on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken.

17. Voters will be asked to indicate whether they wish to be represented by the respondent in their employment relations with the intervener.

18. The matter is referred to the Registrar.

DECISION OF BOARD MEMBER S. COOKE;

I dissent.

2444-83-U Jeanette Kirkpatrick, Complainant, v. The Canadian Union of Public Employees, Local 1329, Canadian Union of Public Employees, Grace Hartman, Gordon J. Allan, Paul Gilbert, and John Vlahovic, Respondents, v. **The Corporation of the Town of Oakville**, Employer

Duty of Fair Representation – Practice and Procedure – Unfair Labour Practice – Unfair representation complaint settled by complainant and union – Settlement seeking order requiring arbitration and waiver of time limits by employer – Employer given opportunity to put complainant to proof of case – Board finding violation – Directing waiver of time limits by employer and compensation by union for period of delay if arbitration successful

BEFORE: Robert D. Howe, Acting Chairman.

APPEARANCES: *Crawford N. McNair and Jeanette Kirkpatrick for the complainant; S. R. Hennessy, Paul Gilbert and Gordon J. Allan for the respondents; D. K. Laidlaw, Q.C., E. M. Stewart, Lois Payne and Arthur Bishop for the employer.*

DECISION OF THE BOARD; May 1, 1984

1. This is a complaint under section 89 of the *Labour Relations Act* in which the complainant alleges that she has been dealt with by the respondents contrary to section 68 of the Act. The essence of the complaint is that the respondents arbitrarily failed to arbitrate the complainant's grievance dated May 25, 1983, concerning her "constructive dismissal" by the Town of Oakville (the "Town").

2. Section 68 of the Act provides:

A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

In *I.T.E. Industries Limited*, [1980] OLRB Rep. July 1001, the Board described the scope and effect of section 68 (then section 60) as follows:

17.*The Labour Relations Act* constitutes the trade union as the employees' exclusive bargaining agent. Within the framework of collective bargaining an employee must depend upon the union to represent him, and cannot bargain individually to establish his terms and conditions of employment. However, the trade union's right to represent employees is not unfettered, and its exclusive bargaining agency carries with it a commensurate responsibility; the union must represent each employee in the bargaining unit, in a manner that is neither "arbitrary, discriminatory, or in bad faith." By enacting section 60 the Legislature has sought to temper the union's authority and prevent abuses which might arise if that authority was entirely unreviewable.

18. Bad faith, malice, discrimination, or subjective ill will are clearly proscribed and readily ascertainable; the real difficulty is to determine when a union's conduct may be properly regarded as "arbitrary" – bearing in mind that the union's affairs may be conducted by laymen with limited formal education, or elected officials who may have been chosen for qualities other than their legal training or understanding of parliamentary procedure. While the Legislature undoubtedly sought to protect the employee from an abuse of the union's authority, I do not think it was intended that every miscalculation, honest mistake, or error in judgment would constitute a breach of a public statute. The standard to which a union must adhere was described in *Ford Motor Company Limited*, [1973] OLRB Rep. Oct. 519 as follows (at paragraph 40):

"40. In deciding whether a union has violated the Act the standards to be applied are important. We recognize that union affairs are conducted for the most part by laymen. In some situations there are experienced full time officials of a trade union who conduct the union affairs; in other situations, the union affairs are conducted by employees in their spare time, while in yet other situations employees may be given a limited amount of paid time by their employers to engage in trade union matters. This Board does not decide cases on the basis of whether a mistake may have been made or whether there was negligence, nor is the standard based on what this Board might have done in a particular situation after having the leisure and time to reflect upon the merits. Rather, the standard must consider the persons who are performing the collective bargaining functions, the norms of the industrial community and the measures and solutions that have gained acceptance within that community; see *Fisher v. Pemberton et al.* 8 D.L.R. (3d) 521 at p. 546."

See also *Savage Shoes Limited*, [1983] OLRB Rep. Dec. 2067 in which the Board wrote:

36. Section 68 requires that each trade union decision be grounded on a consideration of relevant matters, free from the influence of irrelevant considerations. The requirement that a trade union not act in a manner which is in bad faith protects the legitimate expectation that an individual employee's bargaining agent will act honestly and free of any personal animosity toward him. The requirement that a trade union not act in a discriminatory manner protects against the making of distinctions between employees and groups of employees on bases which have no relevance to legitimate collective bargaining concerns. "Bad faith" and "discriminatory", therefore, test for the presence, in the process or results of union decision-making, of factors which should not be present. "Arbitrary", on the other hand, describes the absence in decision-making of those things which should be present. A decision will be arbitrary if it is not the result of a process of reasoning applied to relevant considerations. The duty not to act arbitrarily requires a trade union to turn its mind to the matter at hand.

37. Although this duty is imposed on the trade union as an institution, the trade union observes or breaches the duty through the actions of its officials or decision-making bodies. Especially where an impugned decision is that of single official, there are obvious difficulties in reviewing the process by which that decision was made. Only the union official knows what his thought processes were and what facts and circumstances he actually took into account in the course of arriving at his decision. His ability to recall and articulate what took place in his mind may be influenced, sub-consciously or otherwise, by self-interest and by the knowledge that he is the only witness to these crucial mental events.

38. With these thinking process hidden from direct examination, a review of the behaviour of a trade union official must necessarily focus on what he did and the context in which he did it, as well as on what he says he thought. The result of the decision-making process is weighed against the facts and circumstances on which it is said to have operated. If the resulting interpretation of facts or of a collective agreement is found by the Board to be “reasonable” (*Clifford Renaud*, [1976] OLRB Rep. Jan. 967, ¶22; *Jay Sussman*, [1976] OLRB rep. July 349 ¶11; *I.T.E. Industries Limited*, [1980] OLRB Rep. July 1001, ¶20), “not unreasonable” (*Ivan Pletikos*, [1977] OLRB rep. November 776, ¶13), “not open to challenge” (*Oil, Chemical & Automatic Workers International Union and its Local 9-698*, [1972] OLRB May 521, ¶3), or at least “not implausible” (*Canadian Union of Public Employees Local 1000 – Ontario Hydro Employees Union*, [1975] May 444, ¶32), then the Board is inclined to find that the decision is not arbitrary. Where the decision maker, on the other hand, misapprehends facts and circumstances which the Board considers “patent” and arrives at an “almost perverse” understanding of the facts and circumstances, the Board will conclude that union effectively barred itself from “directing its mind to the real question”, and that in so doing it had acted in an arbitrary fashion: *The Corporation of the County of Hastings*, [1976] OLRB Rep. November 1072, ¶22. Where it is difficult to see a rational pathway between the facts and circumstances said to have been taken into account and the interests said to have been balanced on the one hand, and the result on the other, then there arises a rebuttable presumption that the decision was arbitrary.

39. The required thought process may involve more than the simple application of logic to the information then at hand. Decision making may be arbitrary if, before making its decision, the union fails to identify and seek out sources of further relevant information which should be taken into account in making that decision: *Canadian Union of Public Employees Local 2327*, [1981] OLRB Rep. June 523, ¶30; *Swing Stage re Alvin Plummer* [1983] OLRB Rep. Nov. 1920.

(See also *Swing Stage Ltd.*, [1983] OLRB Rep. Nov. 1920; *Catharine Syme*, [1983] OLRB Rep. May 775; *George Lazenkas*, [1983] OLRB Rep. Jan. 83; *General Motors of Canada Limited*, [1982] OLRB Rep. Feb. 181; and *Bedard Girard Ontario*, [1981] OLRB Rep. Oct. 1338.

3. During the course of settlement discussions which preceded the hearing of this matter, the Canadian Union of Public Employees, Local 1329 ("Local 1329") conceded that it had contravened section 68 of the Act at its June 29, 1983 meeting, at which the decision was made not to refer the complainant's grievance to arbitration. The complainant and the respondents then entered into the following Minutes of Settlement with a view to rectifying that contravention:

1. The Local and the National will seek the following orders from the Ontario Labour Relations Board:

(a) requiring the Local to proceed to arbitration with Mrs. Kirkpatrick's grievance.

(b) waiving the procedural and timeliness requirements of the collective agreement in order to enable the grievance to proceed to arbitration on the merits.

(c) ordering the Local to pay, in the event the arbitrator awards back pay and benefits, the amount which is attributable to the failure to proceed to arbitration.

2. The Local agrees to take Mrs. Kirkpatrick's grievance to arbitration to seek her reinstatement with back pay and benefits and it is agreed that either Jean Hennessy or John Elder will argue the case on her behalf; and on behalf of the Local.

3. The Local agrees to pay that portion of any back pay and benefits found owing by the arbitrator which is attributable to the delay in proceeding to arbitration.

4. Mrs. Kirkpatrick agrees that the above agreement constitutes full settlement of her claims against all respondents with respect to the section 68 complaint in Board File 2444-83-U, subject to acceptance by the O.L.R.B.

The Town did not find that settlement to be acceptable and, accordingly, refused to be bound by it.

4. This complaint initially came on for hearing before Vice-Chairman Owen V. Gray on April 9, 1984, at which time Vice-Chairman Gray delivered an oral ruling with respect to certain preliminary matters. The text of that ruling, together with supplementary reasons, is set forth in a decision dated April 13, 1984 (now reported at [1984] OLRB Rep. Apr. 640). The final paragraph of that decision reads as follows:

8. In my oral ruling of April 9th, I said:

For reasons to be delivered at a later date, I am satisfied that in fashioning remedies for violations of the Act, the Board does have jurisdiction in appropriate circumstances to order that time limits be waived by the parties to a collective agreement.

For the reasons now set out in this decision, that ruling is hereby confirmed. The oral ruling went on to provide:

Before any remedy can be granted, however, a violation must be established. If a remedy sought affects the employer, as the remedy sought does here, the employer is entitled to a hearing with respect to any issues relating to the granting of such a remedy, including issues as to the existence of a breach of the Act and as to circumstances which might lead the Board to grant any particular, or any, remedy for the violation. In this regard, delay in filing the complaint and the reasons for the delay can have an important effect on remedy.

The Town is a respondent in a real sense, and will be so treated in these proceedings. It is entitled to a hearing on any issue which materially affects it. The issue of remedy is such an issue. That issue does not arise until a breach of the Act has been established.

In short, the Board cannot dispose of this complaint in the manner asked by the complainant and trade union respondents without hearing evidence and determining that the evidence warrants the relief sought. In essence, the Town puts the complainant to the proof of her case insofar as it may affect the Town. That is what the complainant must do.

5. This complaint came on before me for hearing on the merits on April 16 and 17, 1984. In addition to certain facts which were agreed upon by the parties to this complaint, and certain documents which were entered as exhibits without formal proof, on the consent of the parties, I also had the benefit of *viva voce* evidence given by the complainant, various other exhibits introduced through the complainant during the course of her testimony, and the complainant's tape recording (and transcript) of the aforementioned meeting of June 29, 1983 (introduced into evidence during cross-examination of the complainant at the instance of the Town). The complainant's tape recording and transcript of a grievance meeting held on June 10, 1983 were also entered as exhibits by counsel for the Town during his cross-examination of the complainant, after the Board directed their production at the request of Town counsel. Although the complaint as originally filed with the Board alleges contraventions of section 68 based upon that meeting, the complainant elected not to pursue that aspect (and a number of other aspects) of her complaint at the hearing of this matter, in view of the respondents' admission that Local 1329 contravened section 68 at the aforementioned meeting of June 29, and in an effort to avoid any unnecessary prolongation of the hearing of this matter.

6. The complainant commenced employment with the Town in August of 1974 as a draftsman. Although she received very favourable ratings in respect of her employment performance and always received her annual merit increases, the complainant received no promotion during the course of her employment with the Town. This lack of promotion, coupled

with other actions by Town officials (including her immediate supervisor, John Vlahovic) which the complainant considered to constitute discrimination and harassment, ultimately prompted her to file a complaint with the Ontario Human Rights Commission in January of 1983. The tension generated by those events caused great anxiety on the part of the complainant, who became very depressed and suffered from a loss of appetite and an inability to sleep. Since her "nerves couldn't take it any longer", she was given sedatives and anti-depressants by her physician, who advised her to stay off work.

7. Commencing on April 9, 1983, the complainant ceased to report for work due to the poor state of her health. On April 12 she submitted to the Town a photocopy of a medical certificate (dated that same day) written on a prescription form from the office of Dr. G. O. Warr, the complainant's family physician. Since Dr. Warr was away at that time, the complainant was seen by another physician, Dr. Vincent Chan, who signed the certificate, which specifies that it is "for Jeanet [sic] Kirkpatrick", and reads:

Please excuse the above from work for 1 - 2 weeks because of illness.
Thanks.

The words "for 1 - 2 weeks" are written between the first two lines of that certificate, above another word which has been stroked out. They are followed by the initials "V.C.", which Dr. Chan apparently printed in parentheses beside the alteration to confirm that it was he who had made that change.

8. In a letter dated April 14, 1983, Ron Foy, the Town's Planning Director, acknowledged receipt of a copy of that medical certificate, but went on to state:

Our regular practice is to require the original Medical Certificate, and it would be appreciated if you would forward this to me at your convenience.

On April 20, 1983, Arthur A. Bishop, the Town's Director of Personnel, wrote to the complainant as follows:

I have a copy of the doctor's slip provided in respect of your current absence. I also have a copy of Mr. Foy's letter requesting that you provide the original of that form to us.

Inasmuch as that slip appears to have been changed to cover a one to two week period of absence, would you please have a certificate provided which will more clearly substantiate the *nature* and *duration* of absence which may be expected in accordance with the provisions of Clause 18.02 of our Collective Agreement with C.U.P.E. Local 1329.

I hope you will appreciate the necessity of providing this certificate and will not be severely inconvenienced in obtaining it for us.

9. Clause 18.02 of the collective agreement that was binding upon the parties at all material times provides:

The Head of the Department and/or the Director of Personnel may require a doctor's report regarding an employee's sickness at any time. In any case, an employee who is absent from work for more than three (3) consecutive working days shall provide his immediate supervisor with a certificate satisfactory to the Corporation, not later than seven (7) days after the commencement of his sickness or upon return to work, whichever occurs first, reporting the nature and duration or probable duration of that period of sickness. Where any period of sickness is for more than fifteen (15) consecutive working days, a certificate from the employee's personal physician reporting the nature and duration or probable duration of the sickness with the first and most recent dates of attendance on the employee, shall be provided within the first fifteen (15) days of absence and every subsequent fifteen (15) days of absence therefrom.

10. On April 25, 1983, the complainant obtained from Dr. Warr a note in which he indicated that the complainant had been "absent from work from April 9 to May 21, 1983 inclusive, because of illness." In response to her request that he indicate the nature of her illness, Dr. Warr advised the complainant that it was not his policy to specify the nature of a person's illness on an "open" medical certificate. The complainant delivered a copy of that note to the Town, by leaving it with the Town's switchboard operator, on April 29. She retained the original because she thought that the Ontario Human Rights Commission might want it. It was also her uncontradicted evidence that she had submitted photocopies of medical certificates to the Town on previous occasions without any suggestion having been made that an original was required.

11. On May 4, 1983, Mr. Bishop caused the following letter to be sent to the complainant by registered mail:

A photostatic copy of a form from your doctor, which you apparently delivered to our switchboard on April 29th, has been forwarded to this office.

I did write to you on April 20, 1983, requesting you provide a report from your doctor outlining the nature and expected duration of your sickness in accordance with the provision of Article 18.02 of our Collective Agreement. Unless that document is in my hands by Wednesday, May 11, I will be forced to recommend no further payment be provided as sick pay and that your actions be interpreted as a quit.

Since the complainant was not at home when the postman attempted to deliver that letter, cards were left in her mailbox advising her that it would be held at the Oakville Post Office for fifteen days. The complainant received cards in respect of two other registered letters at or about that time and attended at the Post Office on May 18 to pick up those three registered letters. Thus, she did not become aware of Mr. Bishop's letter of May 4 and its contents until approximately a week after the May 11th deadline specified in that letter. Indeed, her first indication that she had been "deemed" by the Town to have quit her employment came on May 17, near the end of an Ontario Human Rights Commission fact finding session which had commenced at 10:00 that morning, in respect of her aforementioned complaint of discrimination by the Town and its officials. At that fact finding session, the complainant, with

the assistance of her husband, put forward a conciliation proposal concerning her complaint, but it was rejected by the Town, which did not advance any proposal of its own at that meeting. Mr. Vlahovic opposed her complaint and asserted at that fact finding session that the "relationship had broken down" between the complainant and himself. At approximately 3:45 that afternoon, Mr. Bishop raised the subject of the complainant's medical certificates and advised the complainant that she had been deemed by the Town to have quit her employment. Notwithstanding the fact that the complainant immediately informed the Town that she had not received Mr. Bishop's registered letter of May 4, the Town persisted in its view that the complainant's failure to respond to the request contained in that letter left the Town "no alternative" but to treat her as having quit her employment. That view was confirmed in a letter dated May 19, 1983, which Mr. Bishop caused to be hand delivered to the complainant.

12. On May 19 the complainant delivered a letter to Paul Gilbert, the President of Local 1329, together with a copy of Mr. Bishop's letter of May 4. In her letter, the complainant noted that she had not received Mr. Bishop's letter of May 4 until May 18, and also expressed the view that she had not quit her employment with the Town. Accordingly, she requested Mr. Gilbert to take the required actions to grieve her "constructive dismissal" by the Town.

13. Being dissatisfied with the way in which Mr. Gilbert was handling the matter, the complainant took it upon herself to dictate over the telephone to union steward Marilyn Paterson the following grievance, which was filed with the Town on or about May 25:

I wish to grieve that the Corporation of the Town of Oakville has terminated my employment through "constructive dismissal". This is in contravention of Article 3 Corporation's Rights, Clause 3.01 of the agreement between the Corporation of The Town of Oakville and Canadian Union of Public Employees Local 1329. On May 17th, 1983 I was informed that I was no longer employed by the Corporation and that my benefits and salaries ceased on May 13th, 1983.

On May 27 an addendum to that grievance was drafted by Local 1329 and attached to the grievance without the complainant's instructions. The addendum requested that the complainant be reinstated in her employment with no loss of wages, seniority or benefits as of May 13, 1983.

14. On May 27 the complainant's grievance was reviewed and denied by the Town's Planning Director and the complainant was notified accordingly. By letter dated May 31 from Mr. Gilbert to K. C. Needham, Town Administrator, Local 1329 requested that the grievance be referred to Mr. Needham for a decision in accordance with the collective agreement. On June 10, the complainant attended before Mr. Needham to argue her grievance. At that meeting, at which she was represented and advised by officials of Local 1329, the complainant made it clear that although Local 1329 was requesting reinstatement on her behalf, she was personally seeking only compensation for her "constructive dismissal" and was not seeking reinstatement since the working relationship between herself and her employer had broken down to such an extent that she was suffering ill health as a result of it and could not go back to work under such conditions.

15. Mr. Needham subsequently denied her grievance by means of the following letter dated June 17:

Thank you for appearing at the Grievance Hearing held in my office on Friday, June 10, 1983. At that Hearing, although the representatives of C.U.P.E. Local 1329 stated they wished to have you reinstated as a Draftsperson Grade III effective May 13, 1983, without loss of pay, seniority and other benefits, you indicated you could not return to work for the Corporation and you were making a claim for "compensation and damages".

With respect to the Canadian Union of Public Employees' claim for redress, I must deny the grievance. Notwithstanding letters from the Director of Planning and the Director of Personnel, you failed to provide the information the Employer sought and was entitled to under the terms of the Collective Agreement, nor did you make any offer to provide that information either at the meeting or at any time.

With regard to your request for "compensation and damages", I believe both matters are outside the terms of the Collective Agreement.

16. On June 29 Local 1329 held a membership meeting to deal with, among other things, the question of whether the complainant's grievance should proceed to arbitration. Having carefully considered all of the evidence before the Board concerning that meeting, including the aforementioned tape recording and transcript, I have concluded that Local 1329 did contravene section 68 of the Act as alleged by the complainant and admitted by Local 1329. It appears from the evidence that no consideration was given to the complainant's employment history of almost nine years of exemplary service to the Town. Moreover, no consideration was given to the chain of employment related circumstances which had given rise to the severe anxiety and depression that had necessitated the complainant's absence from work at the time in question. Indeed, there is no evidence that any Union official made any investigation concerning those matters which would clearly be of considerable relevance in the event that the Town's assertion that the complainant had "quit" her employment was rejected at arbitration, and her termination was treated as a discharge. Just before a motion not to support going to arbitration with the complainant's grievance was unexplainedly substituted for C.U.P.E. National Representative Gordon J. Allan's proposal that the motion be to proceed to arbitration, an official of Local 1329 raised the completely irrelevant matter of the complainant's earlier (unsuccessful) attempt to withdraw from the Local. Despite his obvious conflict of interest, union steward John Vlahovic, who was also the complainant's immediate supervisor and one of the targets of her complaint to the Ontario Human Rights Commission, was permitted by officials of Local 1329 to unfairly impugn the complainant's credibility and unduly influence the deliberations. Moreover, the advice of the Union's lawyer that the case should proceed to arbitration was disregarded by Local 1329. No reasonable explanation has been provided for the Local's decision to "not support" the complainant's discharge grievance, despite the strong *prima facie* case of a meritorious grievance that was presented by the complainant at that meeting, with the assistance of Mr. Allan, whose views on the matter were also disregarded by the Local. Under the circumstances, notwithstanding Mr. Laidlaw's very able argument to the contrary, I am satisfied that a breach of section 68 of the Act has been duly established in these proceedings.

17. Following that meeting, Mr. Allan advised Mr. Needham by letter dated July 5 that Local 1329 had decided not to proceed to arbitration with the complainant's grievance. The

complainant testified that “a week or so after the [June 29] meeting” she changed her mind and decided to seek reinstatement with the Town because she “really thought that what had happened was wrong”. However, she conceded in cross-examination that she did not communicate that decision to anyone in the Town until she filed the present complaint in January of 1984. It is common ground among the parties that if the complainant were to be reinstated into her previous position, “it would dislocate one or more present employees from their present position to some extent”.

18. With respect to the matter of remedy, I have concluded that this is an appropriate case in which to direct Local 1329 to refer the complainant’s grievance to arbitration, and in which to make an award of compensation against the Local, contingent upon the grievance succeeding at arbitration and an arbitral award of compensation being made, in respect of the period from June 29, 1983 to April 9, 1984 inclusive, which is the period during which Local 1329’s breach of section 68 of the Act prevented her grievance from being arbitrated. (With respect to the matter of remedy in section 68 cases involving failure to arbitrate a discharge grievance see, generally, *North York General Hospital*, [1982] OLRB Rep. Aug. 1190, and *Leonard Murphy*, [1977] OLRB Rep. March 146.) The Board will also direct the parties to waive all procedural and timeliness requirements of the collective agreement in order to enable the grievance to proceed to arbitration on the merits. However, nothing in this decision is intended to, or shall be construed to preclude the Town from arguing at the arbitration of this matter that reinstatement of the complainant ought not to be directed in the circumstances and that only compensation should be awarded in view of the fact the complainant consistently advised the Town at all material times that she wanted only compensation and did not wish to be reinstated.

19. For the foregoing reasons, the Board, pursuant to section 89(5) of the *Labour Relations Act*, hereby orders, notwithstanding the provisions of the collective agreement binding upon the parties hereto:

- (1) that the respondent Local 1329 forthwith refer to arbitration the complainant’s discharge grievance dated May 25, 1983, as amended by the addendum dated May 27, 1983;
- (2) that the respondent Local 1329 and the respondent Town of Oakville take all steps necessary to have the aforementioned grievance referred to arbitration for a hearing on the merits, and waive all procedural and timeliness requirements which might preclude such hearing;
- (3) that the respondent Local 1329 take all steps necessary to assure that it and the complainant are represented at the arbitration hearing by Jean Hennessy, John Elder, or another representative mutually acceptable to the complainant and Local 1329, at Local 1329’s expense; and
- (4) in the event that an arbitration award provides for compensation to be paid to the complainant, that the respondent Local 1329

compensate the complainant for all wages and benefit losses incurred by her during the period from June 29, 1983, to April 9, 1984, inclusive.

20. The Board remains seized of this complaint for the purpose of resolving any matter arising out of the interpretation or implementation of the above order.

2641-83-R The Employees of Patro d'Ottawa (Patro Ottawa) (Elaine Deschamps), Applicant, v. Canadian Union of Public Employees, Respondent, v. **Patro d'Ottawa**, Intervener

Practice and Procedure – Termination – Two employees testifying as to employee disenchantment with union – No power in Board to test level of union support – Representation vote possible only where voluntary petition signed by sufficient numbers – Petition not voluntary because of involvement of former manager

BEFORE: M. G. Mitchnick, Vice-Chairman, and Board Members W. H. Wightman and B. L. Armstrong.

APPEARANCES: *Bernard P. Quinn for the applicant; John P. Nelligan and Sean T. McGee for the respondent; Raimo T. Heikkila for the intervener.*

DECISION OF THE BOARD; May 11, 1984

1. This is an application for a declaration terminating bargaining rights, under the provisions of section 57(1) of the *Labour Relations Act*. That section provides:

If a trade union does not make a collective agreement with the employer within one year after its certification, any of the employees in the bargaining unit determined in the certificate may, subject to section 61, apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit.

In light of the time required to litigate this matter, together with the context within which it arose, the Board, after considering the evidence and representations of the parties, delivered the following oral reasons for decision.

2. The Board would begin by thanking all three counsel for their courtesy toward one another and to the Board in the handling of this matter and also for the excellence of all three submissions. When the eloquence of counsel is stripped away, however, it comes down to a judgement by the Board based on the evidence before it, and in cases of this kind, each one must be decided on its own facts. The nature of our inquiry is fixed by statute and the sole issue is the voluntariness of the petition itself.

3. This is a termination application under the provisions of section 57 of the *Labour*

Relations Act and subsection 3 of that section provides that upon an application under subsection 1 or 2, (this one is under subsection 1) the Board shall ascertain the number of employees in the bargaining unit at the time the application was made and whether or not less than forty-five per cent of the employees in the bargaining unit have voluntarily signified in writing at such time as it is determined under clause 103(2)(j) that they no longer wish to be represented by the trade union and, if not less than forty-five per cent have so signified, the Board shall, by a representation vote, satisfy itself that a majority of the employees desire that the right of the trade union to bargain on their behalf be terminated.

4. No provision is made in our statute for the Board to satisfy itself by way of discretionary power or otherwise that majority support for the union still exists after a certain period of time has elapsed, or after certain events have taken place, nor do we have such a provision as exists in the *National Labour Relations Act* of the United States allowing some discretion where the facts raise what is referred to as an "issue of representation". (See (1935) P.L. 198, 74th Congress, as amended, section 9(c)(1).) In our own jurisdiction there is only one way in these circumstances to get to a representation vote, and that is to provide the Board with some reasonable assurance of the voluntariness of a statement in writing signed by not less than forty-five per cent of the employees in the unit. We have, of course, heard the evidence and the views of Ms. Deschamps and Mr. Delwaide that they feel that a majority of the employees are disenchanted and looking for ways of extricating themselves from the union but that evidence, no matter how sincere, represents only the opinion of the two witnesses themselves and both, of course, are individuals who may in fact be influenced by their own strong opinions as to the appropriateness of the union continuing. Ms. Deschamps and Mr. Delwaide, no matter how well-intentioned, cannot, either as a matter of fairness or of the law of evidence, purport to speak for the other employees in the unit. The Board rather is required to make a judgement of other employee support or non-support on the basis of the circumstances in which those other employees have been called upon or given the opportunity to affix their signatures to the petition before us.

5. When we ask ourselves whether this petition can be said to fairly represent the voluntary wishes of the employees themselves in general, one element we simply cannot overlook is the role and status of Alain Delwaide.

6. Le Patro is an organization "owned", if we can say that, and operated by the religious order of St. Vincent de Paul. All of its executive officers are members of the Order and all of its officers are appointed by the Order. Mr.

Delwaide is unique amongst the employees of Le Patro in that he, too, is a "religieux", a member of the Order which manages and controls this enterprise. That connection alone, with the strong emotional overtones we have heard about, might be enough to raise a concern with a petition before the Board; but there is, to the knowledge of all employees, in this case much much more. We note and accept the submission of Mr. Nelligan that on the evidence there was no demonstrable "grass-roots" movement to take action against the union prior to the involvement of Mr. Delwaide. Mr. Delwaide was involved from the beginning. In fact more than being involved, Mr. Delwaide was instrumental from the outset, a leader as he himself described his strength and personality. He was a part of the original four who met to discuss the union and what ought to be done and, indeed, that originating meeting was convened at the home of Mr. Delwaide himself.

7. There is no getting around the fact that that home is not an ordinary home. Mr. Delwaide lives in a building adjacent to Le Patro which houses the actual members of the Order, being in this case, the full senior management complement of Le Patro. Mr. Delwaide himself had been a first-line member of management as a co-ordinator from September of 1982 to June of 1983, stepping down for reasons of his own only four months prior to the time that this movement to take action with respect to the union began to take shape. Of lesser importance we might note also that even with that demotion, Mr. Delwaide continued to exercise responsibilities of a degree above those of other monitors, and of other monitors who worked under him.

8. While Ms. Deschamps tended in her evidence to downplay the activities of Mr. Delwaide, his role as the leader and spearhead of the petition is unmistakable from the evidence in general. Mr. Delwaide obtained all of the necessary materials and prepared all the documents. Apart from the initial meeting convened at his home, Mr. Delwaide acknowledged that he "moderated", as he put it, the meeting held at Le Patro where the options open to the employees were ultimately articulated and voted upon. Mr. Delwaide stood before the group at that meeting and wrote these options on the blackboard and then, having from the evidence clearly made his own views known to that point, he indicates that he deliberately abstained from the final discussion and the vote because he said (indicating to us a sensitivity himself to his own position) he did not want to be perceived later as having "influenced" the expression of the other employees. In our view the point at which Mr. Delwaide withdrew himself was artificial and too late to undo the damage which all of his participation had done to that point: the straw vote taken amongst the employees at that time cannot be taken as reliably indicating the sentiments of employees, particularly since Mr. Delwaide remained in the room for the vote itself and participated in the counting. When it came time to circulate the actual petition, Mr. Delwaide was present for the solicitation of many of the signatures, but in any event his role was well known by that time. No matter how much at ease Mr. Delwaide may have himself felt in discussing this matter with other employees, the Board has no reasonable assurance that other employees would view Mr. Delwaide, who was, after all, a "religieux", an individual who lived and ate every day with all of the officers of Le Patro, and who had in fact been a member of management a short time before, with the same ease when expressing themselves on an issue as important to management. The three of us have no doubt that Mr. Delwaide was sincerely motivated by his own views, but a recognition of the freedoms of expression and association of others required that he restrain and withdraw himself from the process of taking action with respect to the union – in the way that he did on the final vote which was taken, but at a much, much earlier stage.

9. On the undisputed facts we have no alternative but to find that the involvement of Mr. Delwaide in the petition before us critically undermined its probative value and we can make no finding of voluntariness based upon it. That is the only issue before us in this termination application and we must not be taken as making any finding or comment upon the reasons put forward for supporting or not supporting the union, nor on any difficulties in bargaining with which this application does not deal. The application itself must be dismissed and we hereby do so.

CONCURRING OPINION OF BOARD MEMBER W. H. WIGHTMAN;

1. This is a unanimous decision of the panel as the Chairman has stated, and as he

has stated as well, the issue, the sole issue before us to decide is the voluntariness of the petition.

2. As opposed to a case wherein a petition accompanies an application for certification under section 7 of the Act, the Board is then free to conduct a case within the bounds of practices which the Board itself determines. In this case the parameters are set by statutory provisions. It is in an application for a certification that it is open to parties to argue, for instance, that unlike federal, provincial or municipal governments, a union is not required to renew its mandate at periodic intervals and, given the importance that free society has placed on the secret ballot vote, an administrative tribunal should be very reluctant to deny requests from employees to exercise that franchise and that means of determining the wishes of majorities. It is also in that context that it could be argued it does not necessarily follow that whatever pressures may have caused employees to sign a petition, those pressures would follow the employees into the sanctity of a government-supervised voting booth. To believe that, it could be argued, is to hold a patronising and condescending view of the employees while calling into question the integrity of government-supervised votes.

3. But the primary reason for my offering a concurring opinion relates to the assertions by witnesses from the petitioners, as well as their submissions, regarding serious problems affecting the morale and the operations of Le Patro in its efforts to serve its clients. As the chairman has said, we make no findings as to whether these assertions are founded in fact. I think it should be noted that employees petitioning this Board are not obliged to make the statements as to why they support or do not support a trade union, let alone prove them; but it seems to me, in joining with my colleagues in this decision, that I should point out that we, as a panel, are not unmindful of the possibilities of problems of the sort described to us arising nor are we uncaring as to the effect our decision may or may not have on those problems. It becomes my personal view (and it is open for me to say this kind of thing as opposed to perhaps my colleagues) but I would observe that whatever "freedom of association" may mean in our Constitution, it is not, I suspect, limited to a system of collective-bargaining and labour-management relations that was devised in the first instance to have application in industrial settings, and which is sometimes not as flexible as we might like to think it is, and when applied in other settings, can give rise to some serious problems.

5. As I say, I would not want anyone to leave this room feeling that we are not conscious of the fact that in many cases that appear before us we are not necessarily able to measure the nature of some of the problems the parties may be facing, nor can we necessarily expect that the specific decision will be dispositive of those problems.

6. Having said that, as I said at the outset, I must join with my colleagues in the decision.

2476-83-R United Food and Commercial Workers International Union, Local 175, Applicant, v. 561270 Ontario Inc., c.o.b. as **St. Laurent I.G.A.**, Respondent, v. Group of Employees, Objectors

Certification Where Act Contravened – Interference in Trade Unions – Unfair Labour Practice – Three managers obtaining signatures on petition opposing trade union – Constituting unlawful interference – Whether managers acting on own behalf or conduct attributable to employer – Contravention can be rectified by remedial order – No certification without vote

BEFORE: Ian C. Springate, Vice-Chairman, and Board Members I. M. Stamp and L. Collins.

APPEARANCES: *Harold F. Caley and John Hurley for the applicant; Walter T. Langley, Tim Laplante and Ed Cheung for the respondent; no one appearing for the objectors.*

DECISION OF IAN C. SPRINGATE, VICE-CHAIRMAN, AND BOARD MEMBER I. M. STAMP; May 25, 1984

1. The name of the respondent is amended to read: “561270 Ontario Inc., c.o.b. as St. Laurent I.G.A.”
2. This is an application for certification.
3. We find that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
4. Having regard to the agreement of the parties, we further find that all employees of the respondent at its stores in Ottawa, save and except full-time meat department employees, department managers, head cashier, office and clerical staff, store manager and persons above the rank of store manager constitute a unit of employees of the respondent appropriate for collective bargaining.
5. On the date of the making of the application there were a total of eighty-five employees in the bargaining unit. The applicant filed evidence of membership with respect to thirty-nine, or slightly over forty-five per cent, of these employees. Given the proportion of employees for whom it submitted membership evidence, for the applicant to be certified pursuant to the general certification procedures set out in the Act, it would first have to receive the support of a majority of employees casting ballots in a representation vote.
6. Rather than have the Board follow the general certification procedures and conduct a representation vote, the applicant requests that it be certified outright pursuant to the provisions of section 8 of the Act. Section 8 provides as follows:

“Where an employer or employers’ organization contravenes this act so that the true wishes of the employees of the employer or of a member of the employers’ organization are not likely to be ascertained, and, in the opinion of the Board, a trade union has membership support adequate for the purposes of collective bargaining in a bargaining unit found by

the Board pursuant to section 6 to be appropriate for collective bargaining, the Board may, on the application of the trade union, certify the trade union as the bargaining agent of the employees in the bargaining unit.”

7. At the commencement of the hearing into this application the parties specifically agreed that in assessing the applicant’s request that it be certified pursuant to the provisions of section 8 of the Act, the Board could rely on information obtained from three separate sources. One of the sources was *viva voce* evidence led before this panel of the Board. A second source was certain facts set forth in a letter to the Board dated January 30, 1984 from counsel for the applicant. Counsel for the respondent agreed that the facts in the letter were correct and could be relied on by the Board, except to the extent that certain specific points might be amplified or contradicted by direct evidence. In fact, no evidence was led to either amplify or contradict any of the material set forth in the letter. The parties also agreed that we could rely on evidence led before a differently constituted panel of the Board chaired by Vice-Chairman M. Mitchnick. This other panel had dealt with a related certification application in File No. 2320-83-R.

8. The only witness to testify before this panel of the Board was Mr. John Hurley, an organizer with the United Food and Commercial Workers International Union. Mr. Hurley testified that the International Union was initially contacted by an employee who works in the respondent’s grocery store located in the City of Ottawa. This initial contact led to a meeting on January 9, 1984 attended by Mr. Hurley and approximately forty-eight of the respondent’s employees. After some discussion, most of the employees present signed a union membership card. The employees signed membership cards with respect to two different locals of the International Union. Those employees working in the respondent’s meat department signed membership cards in Local 633, a local which represents craft units of meat department employees in a number of grocery stores. Employees from all other departments (at times referred to as the “grocery employees”) signed membership cards in Local 175. At the meeting, over fifty-five per cent of the full-time employees in the respondent’s meat department signed membership cards in Local 633. Having regard to the provisions of section 7 of the Act, this meant that Local 633 was in a position to meet the statutory membership requirement for automatic certification. The employees who signed membership cards in Local 175, however, represented only a minority of the respondent’s grocery employees. In the hopes of being able to acquire membership evidence on behalf of more than fifty-five per cent of the grocery employees, at the meeting on January 9th Mr. Hurley handed out blank membership cards in Local 175 with the understanding that some of the employees present would seek to convince other employees to sign the cards.

9. On Tuesday, January 10, 1984 Mr. Hurley filed an application for certification on behalf of Local 633 with respect to the meat department employees (Board File No. 2320-83-R) as well as an application for certification on behalf of Local 175 with respect to the grocery employees (Board File No. 2321-83-R). The two bargaining units initially proposed by the union encompassed the managers of the various departments within the store. Before this panel of the Board, Mr. Hurley testified that in his experience different I.G.A. stores give different levels of responsibility to department managers, such that in some instances they are appropriately included in a bargaining unit, whereas in other instances they are appropriately excluded as persons who exercise managerial functions. Mr. Hurley also explained that the union’s general practice was to file certification applications on behalf of bargaining units which included department managers, but if it subsequently appeared that the department managers

exercised managerial functions, then the union would agree to their exclusion. The respondent in this case filed a reply to both certification applications on or about January 17, 1984. In both replies, the respondent took the position that its department managers should be excluded from the applied for bargaining units in that they exercised managerial functions. With respect to the application dealing with the grocery employees, the respondent's reply expanded on the contention that the department managers exercise managerial functions with the comment that they "have hiring and firing privileges within their respective departments and are privy to confidential financial statements, profit figures and operating objectives".

10. The Board set January 19, 1984 as the terminal date for both certification applications. In accordance with the Board's practice and Rules of Procedure, the union had until January 19, 1984 to file additional membership cards. This date also became the deadline for any employees to file statements of desire in opposition to the two applications. As noted earlier, at the meeting on January 9, 1984 certain union supporters took blank membership cards in Local 175 for the purpose of approaching other employees to get them to sign. Mr. Hurley testified that he expected that a number of additional grocery employees would sign membership cards, but none did. Mr. Hurley further testified that he had made arrangements to meet with certain of the respondent's employees on January 17, 1984 in order to discuss matters relevant to the two applications, but that none of the employees showed up at the meeting place. On the following day, January 18, 1984, statements in the form of "petitions" expressing opposition to the two certification applications were signed by nine meat department employees and fifty-four grocery employees. These petitions were filed with the Board on January 19th, the terminal date. On that same day Mr. Hurley wrote to the Board to withdraw the certification application filed on behalf of Local 175. Mr. Hurley testified that he withdrew the application because he had not received any additional membership cards.

11. The application for certification by Local 633 with respect to the respondent's meat department employees came on for hearing before a Board panel chaired by Mr. Mitchnick on January 27, 1984. Before this panel of the Board, Mr. Hurley testified that on the day prior to the January 27th hearing he had attempted to get certain employees to meet with him respecting the application, but without success. During the course of the hearing on January 27th, the respondent outlined its management structure to the Board, following which the union agreed with the respondent's contention that the meat department manager exercised managerial functions and hence should be excluded from the bargaining unit. The Board then announced the "count" indicating that Local 633 had filed membership cards with respect to more than fifty-five per cent of the employees in the meat department bargaining unit. The Board then turned to consider the petition in opposition to the application signed by nine meat department employees.

12. In instances where a union has met the statutory requirement for automatic certification by filing membership cards on behalf of more than fifty-five per cent of the employees in a bargaining unit, the Board still retains a discretion to direct the taking of a representation vote. The Board's practice is to direct such a vote where sufficient numbers of union members have voluntarily indicated that they have had a "change of heart" about being represented by a union. Before it will direct the taking of a vote, however, the Board seeks assurances that a document expressing opposition to the union does in fact represent a truly voluntary signification on the part of employees who signed it. In instances where members of management have been involved in the origination or circulation of such a document, the Board's practice is not to give the document any weight. This is due to a concern that union members may

have signed the document not as a result of any real change of heart about the union, but only to avoid revealing their union support to management. Evidence led at the hearing on January 27, 1984 indicated that the petitions filed in opposition to both the Local 633 and Local 175 applications had been drafted at the instance of the same people, and that signatures on both documents had been acquired at the same time. The evidence further indicated that three department managers had been active with respect to the origination of the petitions and obtaining employee signatures on them. After this evidence had been tendered, the group of employees who had been relying on the petition in opposition to the Local 633 application formally withdrew the petition. The Board then announced that it would be certifying Local 633 as the bargaining agent of employees in the respondent's meat department.

13. At the hearing before this panel of the Board, Mr. Hurley testified that the evidence led at the hearing on January 27, 1984 caused the union to re-evaluate its position insofar as it related to the grocery employees. As a result of this re-evaluation, on January 30, 1984, Local 175 filed a second application for certification, which is the one now before us. This application specifically excluded department managers from the applied for bargaining unit. In support of its second application Local 175 filed the same membership cards as it did in its earlier application. However, in support of its application to be certified under section 8, the local also relies on the facts surrounding the origination and circulation of the petitions filed with respect to the earlier applications.

14. Before proceeding further, we would note that in response to the second application for certification by Local 175, a new statement of desire in opposition to the application signed by twelve bargaining unit employees was filed. No one attended at the hearing in support of this statement and neither of the other parties sought to rely on it in any way. Accordingly, we are not prepared to give the document any weight, and will not refer to it again in this decision.

15. Local 175 would be entitled to be certified outright pursuant to the provisions of section 8 of the Act if the Board were satisfied that:

- (a) the respondent has violated the Act;
- (b) The true wishes of the respondent's employees are not likely to be ascertained either from its membership cards or in a representation vote; and,
- (c) in the Board's opinion the Local has support adequate for collective bargaining.

16. Given the Board's jurisprudence, there is little doubt but that the Board would not have given any weight to the petitions obtained by the three managers as being voluntary expression of employees' desires. In this case, however, we are required to go farther and deal with two additional issues. The first is whether the actions of the managers involved a violation of the Act on the part of the respondent. The second is whether the action of the department managers, as well as any other relevant matters, resulted in a situation where employees were not able to express their true wishes during the union's organizing campaign and would not now be able to express their true wishes in a Board conducted representation vote.

17. We turn now to consider in some detail the involvement of the three managers with the anti-union petitions. The three managers involved were Mr. Jacques Lalonde, the manager of the respondent's deli department, Mr. Jean Guy Raccine, the manager of the meat department and Mr. James Broome, the manager of the produce department. The letter of January 30, 1984 sets out the functions of the managers as including:

- “(i) the effective hiring and firing of staff;
- (ii) disciplining of employees in own department;
- (iii) they have access to financial statements and personnel documents;
- (iv) they are involved in budget discussions;
- (v) the issuing of reprimands to employees;
- (vi) attend management meetings.”

18. As indicated earlier, Mr. Hurley met with a number of employees on Monday, January 9, 1984, at which time they signed membership cards. On that same evening, at least one of the department managers overheard some employees discussing the union. When giving evidence before the Board panel chaired by Mr. Mitchnick, Mr. Raccine, the meat department manager, testified that on January 10, 1984 he went to see Mr. T. Laplante, the store manager, to advise him that employees were discussing the union. According to Mr. Raccine, Mr. Laplante's reply was that he was already aware of this fact. Mr. Raccine testified that during his meeting with Mr. Laplante there was no talk of a petition.

19. On or about Tuesday, January 16, 1984, the Board's "Notice to Employees of Application for Certification and of Hearing" (commonly referred to as the "green form") was posted with respect to the two initial certification applications. The applied for bargaining units described on the forms indicated that the union was seeking to include departmental managers within the bargaining units. Subsequent to the posting, Mr. Raccine had a discussion with Mr. Laplante. The material before us, however, is silent on the question of whether they talked about a petition. On Wednesday, January 18, 1984 Mr. Raccine, Mr. Lalonde and Mr. Broome began to obtain signatures on the petitions in opposition to the two applications. There is very little material before us related to the origination of the petitions. However, what material there is indicates that the petitions were drafted by a lawyer who had met with Mr. Raccine and possibly the other two managers. The petitions had a typed heading with space left under the heading for employees to sign their names. Below the space for employee signatures was typed the following:

“This statement of desire is filed on behalf of the above noted employees
by:

Name	Signature	Mailing Address
Jacques Lalonde		1021 St. Laurent Boulevard

Jean Guy Raccine

1021 St. Laurent
Boulevard

James Broome

1021 St. Laurent
Boulevard''

When filed with the Board, the two petitions contained the signatures of the three managers in the spaces indicated. The address, 1021 St. Laurent Boulevard, is the address of the respondent's store in Ottawa.

20. Employees signed the petitions in the respondent's staff lunchroom. Employees were approached individually by either Mr. Lalonde, Mr. Raccine or Mr. Broome during working hours and directed to go to the lunchroom. Once in the lunchroom, each employee was asked by either Mr. Lalonde or Mr. Broome to sign a petition. In all, forty-five of the eighty-five grocery employees signed a petition. At the hearing before this panel, Mr. Hurley testified that although he had no personal knowledge of the matter, it was his understanding that Mr. Laplante, the store manager, had also interviewed employees in connection with the union. This hearsay evidence was not supported by any direct evidence led before this panel of the Board, the panel chaired by Mr. Mitchnick, or the facts set forth in the letter of January 30, 1984. Accordingly, we are not prepared to give Mr. Hurley's evidence on point any weight. However, given the manner in which employees were directed to the lunchroom by the three department managers during their working hours, and the total time that the three managers were likely involved with the petitions, we feel it reasonable to conclude that Mr. Laplante was probably aware of their activities. Under normal circumstances, one would have expected Mr. Laplante to take steps to ensure that employees and the three department managers spent their working hours attending to their normal duties. However, it appears that Mr. Laplante took no such steps. We would note at this point that in contemplation of the hearing before this panel of the Board, Mr. Hurley arranged to meet with five bargaining unit employees on February 15, 1984, but none of them turned up at the arranged meeting spot.

21. It is the applicant's position that the conduct of the three department managers violated a number of sections of the Act. The most relevant of these is section 64 which provides as follows:

"No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence."

22. We are satisfied that the action of the three department managers in seeking to get employees to sign an anti-union petition involved an interference on their part with the selection of a trade union by employees. Generally, the actions of managerial personnel, even those at the bottom of the management hierarchy, can be automatically attributed to their employer, such that a violation of the Act by any managerial person will involve a violation of the Act on the part of the employer. In the instant case, however, the respondent contends that the three department managers were not acting on behalf of the respondent, but rather

on their own behalf. In support of this position the respondent relies on the fact that the bargaining units originally applied for by the union included the department managers. We acknowledge that there might well be instances where it could appropriately be held that a member of management was not acting on behalf of management. On balance, however, we are satisfied that this is not such a case. Whatever their original motivation might have been, the three department managers utilized their management status in getting employee signatures on the petitions by directing employees during their working hours to go to the lunchroom. Further, notwithstanding that the three managers made use of their management status and also took a considerable amount of time off work in connection with the petitions, neither the store manager nor anyone else in management took any steps to stop them. In our view, the action of senior management in permitting the department managers to use their managerial authority to solicit opposition to the union during working hours meant that the respondent approved and essentially adopted their actions. It might be noted that the store manager and the three department managers attended at the hearing before this panel of the Board with representatives of the respondent, but were not called to testify so as to further clarify any of these matters. Given these considerations, we are of the view that the actions of the three department managers should appropriately be viewed as the actions of the respondent. We accordingly find that the action of the three department managers in interfering with the selection of a trade union by employees involved a breach of section 64 of the Act on the part of the respondent.

23. As the wording of section 8 makes clear, automatic certification is not the appropriate response to every employer violation of the Act committed in response to a union organizing campaign. The intended purpose of the section was summarized in *Ex-Cell-O Wildex Canada* [1977] OLRB Rep. June 370 at p. 373 as follows:

“Section 7a (now section 8) allows the Board to certify a trade union as bargaining agent without the membership percentage usually required for outright certification. It is not surprising, then, that the Legislature has placed a number of legal restrictions on its use. As the wording of the section makes clear, it is not enough that the employer has engaged in conduct prohibited by the Labour Relations Act. This conduct must have resulted in a situation where the true wishes of the employees are not likely to be ascertained from the results of a representation vote. As well, the trade union must, in the opinion of the Board, have membership support adequate for the purposes of collective bargaining in the unit found appropriate by the Board.

The logic of these requirements is clear enough. The premise of the Act's certification procedures is that collective bargaining is to be afforded only when it is the choice of the majority. Accordingly, the grant of automatic certification to a trade union, in the absence of documented evidence of majority support, should only be permitted where the true wishes of the employees are not likely to be ascertained through the normal procedures and where the union has sufficient support among the employees in the unit to bargain collectively with the employer.”

24. In a number of cases the Board has applied section 8 where an employer has violated the Act by indicating to employees, directly or by implication, that continued job security depended on the union not being certified. See: *Dylex Limited* [1971] OLRB Rep. June 357 and *DI-AL Construction Limited* [1983] OLRB Rep. March 356. The Board has also applied the section where the cumulative effect of a range of unlawful employer activities, none of which taken separately might call the section into play, have had the effect of undermining the rule of law such that employees could not feel confident that the protections of the law would guarantee them a free choice in deciding whether or not to be represented by a trade union. See: *Radio Shack* [1979] OLRB Rep. March 248 and *Skyline Hotels Limited* [1980] OLRB Rep. Dec. 1811. In certain cases where an employer has violated the Act, however, the Board has declined to apply section 8 because it felt that the violation was not of the type that would deprive employees of the ability to express their true wishes in a representation vote. See: *Homeware Industries Limited* [1981] OLRB Rep. Feb. 164 and *The Globe and Mail Division of Canadian Newspapers Company Limited* [1982] OLRB Rep. Feb. 189. One of the factors the Board looks at in assessing whether employer breaches of the Act affect the ability of employees to express their wishes so as to justify certification without a vote is whether effective remedies for those breaches can be fashioned so as to create a climate in which a representation vote might successfully ascertain employee wishes. See: *Seven-Up/Pure Spring Ottawa, a Division of Seven-Up Canada Inc.* [1984] OLRB Rep. Jan. 87 and the cases cited therein.

25. In the instant case, no member of management threatened the job security of employees or made any other threat to employees. Further, there is no evidence of on-going improper conduct on the part of the respondent. Notwithstanding these facts, the role of the three department managers in improperly obtaining employee signatures on petitions against the union on January 18, 1984 would likely have had some impact on employees. This impact may well have resulted in some employees not signing union cards on January 18th and 19th, the last two days they could have done so. It may also have been at least part of the reason why on January 26th no employee would meet with Mr. Hurley to discuss the application pertaining to the meat department and why no employee met with him with respect to the instant application. However, the failure of any employees to meet with Mr. Hurley on or before January 17th could not have been due to the same reason. Neither can the fact that no grocery employees signed union cards between Mr. Hurley's meeting with employees on January 9th and the events of January 18th. When all these considerations are taken into account, we do not believe that this is an appropriate case in which to certify the applicant outright. Rather, we believe that the adverse impact of the respondent's contravention of the Act can be rectified in such a way as to enable the true wishes of employees to be ascertained in a representation vote. In order to rectify the breach of the Act, we direct that the respondent:

1. Cease and desist violating section 64 of the *Labour Relations Act*.
2. Post the attached notice, in the French and English languages, as supplied by the Board, on its premises where they are likely to come to the attention of the employees and to leave such notices posted uncovered by any other material, until the conclusion of the representation vote.
3. Give a representative of the applicant reasonable physical access to its premises at reasonable times so that the applicant can satisfy itself that the posting requirements are being complied with.

4. Provide two representatives of the applicant with an opportunity to address the employees in the bargaining unit referred to in paragraph 4 above, out of the presence of any member of management, during normal working hours without loss of pay, for a minimum of one hour. Such meeting will be at least three full days prior to the date of the representation vote.

26. We direct that a representation vote be conducted among the employees of the respondent in the bargaining unit described in paragraph 4 of this decision. Those eligible to vote are all employees of the respondent in the bargaining unit on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken.

27. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with the respondent.

28. The matter is referred to the Registrar.

29. The decision of Board Member L. Collins will be issued at a later date.

[Editor's Note: The French translation of the Notice to Employees has been omitted]

Appendix

The Labour Relations Act

NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

WE HAVE POSTED THIS NOTICE IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD ISSUED AFTER A HEARING ARISING OUT OF THE EFFORTS OF UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION LOCAL 175 TO REPRESENT CERTAIN OF OUR EMPLOYEES. THE ONTARIO LABOUR RELATIONS BOARD FOUND THAT WE VIOLATED THE LABOUR RELATIONS ACT BY INTERFERING WITH THE RIGHTS OF OUR EMPLOYEES TO SELECT A BARGAINING AGENT OF THEIR CHOICE.

THE ACT GIVES ALL EMPLOYEES THESE RIGHTS:

TO ORGANIZE THEMSELVES.

TO FORM, JOIN AND PARTICIPATE IN THE LAWFUL ACTIVITIES OF A TRADE UNION.

TO ACT TOGETHER FOR COLLECTIVE BARGAINING.

TO REFUSE TO DO ANY AND ALL OF THESE THINGS, IF THEY WISH.

WE ASSURE ALL OF OUR EMPLOYEES THAT WE WILL NOT DO ANYTHING THAT INTERFERES WITH THESE RIGHTS.

THE LABOUR RELATIONS BOARD HAS DIRECTED THAT A REPRESENTATION VOTE BE HELD AMONG THE EMPLOYEES SOUGHT TO BE REPRESENTED BY LOCAL 175. PRIOR TO THE TAKING OF THE VOTE WE WILL ENSURE THAT REPRESENTATIVES OF THE UNION WILL BE ABLE TO MEET WITH EMPLOYEES DURING WORKING HOURS, IN THE ABSENCE OF MANAGEMENT, WITHOUT LOSS OF PAY.

561270 ONTARIO INC., C.O.B. AS ST. LAURENT I.G.A.

This is an official notice of the Board and must not be removed or defaced

0064-84-R Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, Applicant, v. **T. Eaton Company Limited**, Respondent, v. Group of Employees, Objectors

Bargaining Unit – Department store maintaining “business centre” as self-contained dept. for computer and office equipment for businesses – Employees having specialized technical skills and not inter-changeable – Paid solely on commission basis – Whether excluded from unit for lack of community of interest

BEFORE: M. G. Mitchnick, Vice-Chairman, and Board Members J. W. Murray and B. L. Armstrong.

APPEARANCES: *Hugh Buchanan and Carole Currie for the applicant; Colin Morley and Ronald A. Hubert for the respondent; Greg F. Bowes for the objectors.*

DECISION OF THE BOARD; May 7, 1984

1. This is an application for certification.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
3. This application, which has been split into a “full-time” and a “part-time” unit, essentially involves the sales staff of the Eaton’s store located in the Scarborough Town Centre. Following the pattern established in the certifications already granted the applicant at other Eaton’s locations (Board File Nos. 2620-83-R and 3015-83-R), the parties were able to reach almost full agreement on the description of the appropriate bargaining units. The one exception concerned the sales staff employed in the “Eaton’s Business Centre”. This Centre represents a recent innovation in the services which Eaton’s makes available to its customers. While the intention is to extend the service across many of Eaton’s stores, it presently is contained in only a few, and has not had to be dealt with in any of the prior applications before the Board.
4. The Business Centre at the Scarborough Town Centre store presently employs five persons, and is physically designed as a self-contained department within that store. It is conceded that this is not the only sales department in that store so designed. The focus of the Centre is on the provision of computer and other office equipment for small businesses. This involves equipment of a sophisticated nature, and the specialised technical skills required of persons hired into the department (apart from the intensive four-week training which Eaton’s provides) are not the same as those required in any of the other sales departments. One consequence of this has been the inability of the respondent to staff this department from amongst any of the other personnel in the store. The other consequence, the respondent is probably correct in conjecturing, is that individuals coming into this department are not likely to do so with a view to moving into other sales areas in the store as openings arise. The salesmen in the Business Centre operate entirely on commission, and that commission is structured in a way that is distinct from any other departments in the store. The fact remains, however, that other departments in the store do have staff that operate entirely on commission. Given the time often required to ultimately consummate a sale with Business Centre customers, as well as the need to continue to advise the customer on the application of the company’s equipment,

the sales staff of the Centre generally spend more time away from the store (up to 30 per cent) than do the sales staff of other departments, and are comparatively flexible in their hours. Once again, however, it is conceded that a flexibility in hours generally exists as well for other sales staff at the store operating on commission. And as one reflects upon the various departments in an Eaton's store, one sees parallels as well, for example, with the home consultation process of the Interior Design departments.

5. While the respondent's desire to maintain flexibility within this new and sophisticated sales area is understandable, the ramifications for collective bargaining of the submissions it puts forward are a concern. The Board in recent years has embarked on a deliberate course of steering away from classification or departmental bargaining units, because of the high potential for fragmented bargaining which that creates. See, for example, *Cryovac Division W. R. Grace & Co. of Canada Limited*, [1981] OLRB Rep. Nov. 1574; *Toronto East General and Orthopaedic Hospital Inc.*, [1981] OLRB Rep. Nov. 1672; *University of Ottawa*, [1981] OLRB Rep. Feb. 232; *Westeel-Rosco Company Limited*, [1979] OLRB Rep. Nov. 1125. Even in the newspaper industry, where departmental unionization had existed in the ultimate, the Board in 1981 signalled its intention to reverse the entrenched organizing patterns of the past, in favour of broader-based bargaining. In the *Hamilton Spectator* case, [1981] OLRB Rep. Aug. 1177, the Board observed:

7. As a general practice the Board does not grant certification on a departmental basis. For historical reasons exceptions were made in the newspaper and printing industry. Those industries were traditionally organized by craft unions at a time, long pre-dating the existence of this Board, when the printing trades were distinguished by specialized skills that gave rise to clear distinctions along craft lines. (See, Zerber *The Development of Collective Bargaining in the Toronto Printing Industry in the 19th Century* (1975) 30 IR/RI 83. From its earliest days the Board granted certificates in the newspaper industries reflecting the traditional craft designations. (See, e.g. *The Ottawa Citizen*, [1944] OLRB Rep. Aug.; *The Star Publishing Company of Windsor, Limited*, (1945) CLLC ¶10,424. The traditional preponderance of craft units in the newspaper industry tended to produce more fragmented bargaining structures than would be encountered in other industrial settings. That may explain why, over the years, the Board often acceded to the agreement of the parties to departmental units of employees who did not possess craft skills. Generally in an industrial setting the Board would, apart from any special craft units, contemplate a breakdown of employees for collective bargaining purposes into office and clerical employees on the one hand and production employees on the other. When a plant is substantially organized along those lines any union seeking to obtain certification for a departmental unit is normally required to take a tag end unit of all unorganized employees. The obvious reason is to avoid undue fragmentation in collective bargaining.

8. In the instant case the parties were unable to refer the Board to any precedent decisions in which the practice of permitting departmental bargaining units in the newspaper industry was fully explained. A review of the Board's prior decisions suggests that the practice has evolved more

as a matter of deferring to the agreement of the parties in the industry, an obviously critical consideration, rather than by the application of normative collective bargaining principles in disputed cases. If in the past the Board has acceded to agreements establishing the non-craft departmental units in the newspaper industry, it has not done so without some guarded concern.

6. In the present case, some differences do exist between the sales staff of the Business Centre and those of other departments. But these are differences essentially in degree, and the most distinctive of the Business Centre's working conditions are not without parallels, as discussed above, in some or other of the sales departments already encompassed within the agreed-upon units for this store. Nor does an apparent lack of interest in lateral transfers form a compelling basis for compartmentalized bargaining: the same could be said for many of the technically-skilled and higher-paid departments within an industrial production facility, yet the Board has not viewed as appropriate a proliferation of self-contained skilled-trade or similarly specialized units within a plant. While the question before us in the present application is whether to accede to the request of the employer to allow this one small group to remain outside the broad-based sales unit, viewing the matter from the point of view of its corollary better illustrates the problem. If the 5-man sales unit of the Business Centre is appropriate for exclusion from the broader sales unit now before us, it presumably would also be found appropriate as a self-contained bargaining unit at another store, where *no* other union organizing may yet have taken place. That is not the kind of piecemeal organizing or collective bargaining which the Board would be anxious to foster in this industry. While the needs of the Centre may require certain accommodations, we are not persuaded on the facts that those accommodations cannot be made within the broader context of the varyingly specialized and commissioned/non-commissioned sales unit.

7. Having regard to the foregoing, therefore, and to the agreement of the parties generally, the Board finds:

- (1) All employees of the respondent at its retail store in the Scarborough Town Centre, Municipality of Metropolitan Toronto, save and except sales managers, merchandise presentation managers, food services managers, operating services managers, maintenance managers, and foremen, persons above the rank of sales manager, merchandise presentation manager, food services manager, operating services manager, maintenance manager or foreman, employees of Eaton Travel Ltd., employees of Eaton Bay Financial Services Ltd., office and clerical staff, management trainees, security staff, medical services nurse, persons regularly employed for not more than twenty-four hours per week, students employed during the school vacation period and students employed on a co-operative program with a school, college or university (unit #1); and
- (2) All employees regularly employed for not more than twenty-four hours per week and students employed during the school vacation period of the respondent at its retail store in the Scarborough Town Centre, Municipality of Metropolitan Toronto, save and except sales managers, merchandise presentation managers, food services managers,

operating services managers, maintenance managers, and foremen, persons above the rank of sales manager, merchandise presentation manager, food services manager, operating services manager, maintenance manager, or foreman, employees of Eaton Travel Ltd., employees of Eaton Bay Financial Services Ltd., office and clerical staff, management trainees, security staff, medical services nurse, and students employed on a co-operative program with a school, college or university (unit #2),

constitute units of employees of the respondent appropriate for collective bargaining.

8. The Board notes by way of clarity that the applicant has agreed to the exclusion of "personnel staff" on the basis that there are two persons employed in the personnel department of this store, and that these two persons would be "office" rather than "sales" staff in any event. The issue of employment in a confidential capacity simply does not arise in the present case.

9. The Board further notes by way of clarity that employees of the respondent headquartered or working out of other locations who work in the Scarborough Town Centre are not within either bargaining unit.

10. Based on all of the material before it, the Board is satisfied that more than fifty-five per cent of the employees of the respondent in each bargaining unit at the time the application was made were members of the applicant on April 17, 1984, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

11. A certificate will issue to the applicant for each bargaining unit.

1800-81-U;1971-82-R Mauri Ahokas and 75 other employees, v. The Canadian Union of Public Employees, Local 87, Canadian Union of Public Employees, Grace Hartman, G. LeBel, Eileen Okerlund, William McFarlane, Gloria Welch, Arlene Parker and Eileen Rice, Respondents; The Municipal Technicians Association of the City of Thunder Bay, Applicant, v. **The Corporation of the City of Thunder Bay**, Respondent, v. Canadian Union of Public Employees, Local 87, Intervener

Bargaining Unit – Certification – Duty of Fair Representation – Evidence – Practice and Procedure – Remedies – Unfair Labour Practice – Misrepresentation and maneuvering breach of Act by union – Carving out of group not receiving representation last resort – Not necessary in circumstances – Restructuring of bargaining committee directed to provide input from affected group – Damages, refund of dues and costs not granted – Evidence allowed as to steps taken by union to remedy situation subsequent to finding of breach

BEFORE: M. G. Picher, Vice-Chairman, and Board Members J. A. Ronson and W. F. Rutherford.

APPEARANCES: *F. J. W. Bickford for the complainant and applicant; S. R. Hennessy for the respondent union and intervener.*

DECISION OF M. G. PICHER, VICE-CHAIRMAN AND BOARD MEMBER W. F. RUTHERFORD; May 4, 1984

1. By its decision dated May 31, 1983, reported at [1983] OLRB Rep. May 781, the Board determined that the respondent trade union in the section 68 complaint violated the duty of fair representation. We remained seized for the purpose of hearing further submissions with respect to the issue of remedy, reserving the right to deal with outstanding issues in respect of the application for certification as part of the same proceedings. To that end a further hearing was held in Thunder Bay at the which the parties to both the section 68 complaint and the application for certification made full submissions on all issues then outstanding. Those issues are the remedy appropriate to redress the violation of section 68 by the respondent union and the merits of the application for certification, having particular regard to the composition of the bargaining unit. As our earlier decisions have noted, the employees, some 76 in number, who were complainants in the section 68 proceedings have formed a separate employees' association representing technical and professional employees employed by the City. Their application for certification seeks to allow them to break away from the existing bargaining unit of inside municipal employees.

2. At the hearing devoted to the outstanding issues the respondent union sought to adduce evidence relating to the content of a collective agreement concluded since the complaint was filed as well as relating to the newly constituted executive. The purpose of its evidence was to establish that there has been a change of individuals responsible for bargaining on behalf of the unit of inside employees. Counsel for the complainant employees objected to the admission of that evidence, and his objection was overruled. During the hearing of the complaint we proceeded on the understanding that initially evidence and argument would be adduced going solely to the issue of the merits of whether there had been a violation of the duty of fair representation. It was understood that we would remain seized of the larger issue

of the remedy, and the parties marshalled their evidence pursuant to that understanding. In our view it would be manifestly unfair to now prevent the union from adducing evidence which could establish some mitigation of the damage to the complainants or a *bona fide* attempt by the respondent union to make adjustments with a view to protecting them in the future. Labour relations realities are not frozen on the date of a given complaint. It is well established that the Board will, in any section 89 complaint, consider the conduct of the parties both before and after a complaint has been filed with a view to fashioning the most appropriate remedial response. A union could not, for example, object to the admission of evidence establishing that employees discharged for anti-union animus have been reinstated by the employer since the complaint was filed. Developments of that kind are significant facts which the Board can and should take into account in the overall determination of a remedy. For the foregoing reasons the Board allowed the union to adduce the evidence which it proposed to call.

3. Counsel for the complainants then indicated that he wished to call evidence to establish what he alleged was a recent violation of the duty of fair representation against a technical employee, Mr. William Kuzik. It appears that Mr. Kuzik was unsuccessful in an application for local union funds to attend a CUPE conference in Toronto. It is alleged that the person sent to the conference by the local was less directly involved in technical and professional matters than Mr. Kuzik and was selected as a result of discrimination or bad faith.

4. For several reasons, we declined to allow that evidence to be adduced. Firstly, Mr. Kuzik is not and never has been a complainant in these proceedings. As the evidence establishes, he remained active in the respondent union, retaining an executive office as part of the bargaining committee well after the split between the respondent union and the employees represented by Mr. Roy and Mr. Zapior. Secondly, and more importantly, as the Board noted in its earlier decision the duty of fair representation relates to the representation of individual bargaining unit members in their relations with their employer. It does not involve scrutiny of the political give and take internal to a union, save in the narrow exception where union conduct may involve intimidation and coercion in violation of specific provisions of the *Labour Relations Act*. In the principal hearing the Board specifically overruled the attempt of counsel for the complainants to adduce evidence with respect to alleged irregularities in the allocation of funds for a union convention in Winnipeg. See *The Corporation of the City of Thunder Bay*, [1983] OLRB Rep. May 781 at 811-12. For the same reasons we declined to hear the additional evidence respecting Mr. Kuzik, who is not a complainant in these proceedings.

5. Counsel for the complainants, who are also the members who constitute the applicant in the request for certification, made a number of alternative submissions. Firstly, he maintains that the Board should certify the Municipal Technicians' Association as a separate bargaining unit because of the quality of representation which they have received in the past, the separate community of interest which he maintains they have and, lastly, the aggravated division between the technical and professional employees and the clerical employees arising out of the violation of section 68. Secondly, he seeks damages in relation to the wages which he maintains were lost to the complainants by virtue of the violation of section 68 by the respondent union. Thirdly, he asks for an order for the payment of legal costs to the complainants in the section 89 complaint. Fourthly, he maintains that the complainants should be refunded all dues which they have paid to Local 87 since the date of the complaint, with interest. Finally, and in the alternative, he submits that if the Board does not accept that the existing bargaining unit should be divided in a way that would remove part of it from the

hands of the respondent local, the Board should order the local to assign that part of its bargaining rights for the technical and professional employees to the applicant association on condition that it receive a charter as a local from CUPE's national.

6. Counsel for the complainants stresses the erosion of the differential in wages which has marked the history of the existing bargaining unit, noting that in 1970 the employees in the higher rated categories had a wage differential of 122.5 per cent over the the employees, chiefly clerical and secretarial, in the lower rated groups. That margin was reduced to 63 per cent by 1981. He argues that while that does not disclose a violation of section 68 it does support the submission that there has been a marked deficiency in the quality of representation of the technical and professional employees who have felt compelled to form their own association. Pointing to the efforts of Mr. Roy to explain to the general membership the severity of the ongoing erosion of the position of the higher rated employees, counsel for the complainants emphasizes that the respondent union fully appreciated the problems of the higher rated employees and deliberately ignored them. He submits that even though there has been a re-composition of the union executive, majoritarian domination by the clerical employees will continue. In his submission, for that reason there is no reason to believe that the situation will improve in the future. In this regard counsel for the complainants also notes the apparent inability of the respondent national union to correct or substantially influence the course of events within Local 87.

7. With respect to the argument on community of interest, counsel for the applicant association stresses the standards established by the Board's *Usarco* decision, [1967] OLRB Rep. Sept. 526. He submits that the nature of the work performed by the technical and professional employees, their conditions of employment, their skills, the administrative framework in which they are employed, the geographical location of their employment and their functional coherence and inter-dependence all would support the conclusion that they have a separate community of interest from the clerical and secretarial employees. He maintains that the development of new technologies, particularly in the area of computers, has produced a wider gap between the professional employees and those in the clerical ranks, so as to justify still further their separate treatment for the purposes of collective bargaining.

8. Counsel for the applicant association submits that its certification for a separate unit of clerical and professional employees would be the most adequate form of redress for the violation of the duty of fair representation found by the Board to have occurred. He argues that that would be the surest guarantee against the failure of representation which he submits has occurred to date. In the alternative, he maintains that if the Board is not prepared to sever the existing bargaining unit so as to remove it from the hands of the incumbent union, it should order Local 87 to invoke those procedures under the national constitution of the Canadian Union of Public Employees which would permit it to transfer part of its jurisdiction to the applicant association, thereby allowing the association to gain the status of a new local under CUPE, subject to the approval of the national.

9. With respect to the payment of compensation, the first submission of counsel for the complainants is that the Board should order the respondent local to pay to each of the complainant employees the difference between the amount of wages which were adopted by the general membership at its meeting of May 4, 1980 and the higher rate of wages which

was then contained in the alternative offer of the City which the Board has found was wrongfully concealed from the general membership. That is the difference between the wage increase across the board of 67¢ an hour in the first year coupled with 9% in the second year and the more beneficial wage from the standpoint of the higher rated employees, which was the alternative offer of a wage increase of 8-1/2 per cent across the Board in the first year and 9% in the second. Counsel for the complainants maintains that that difference should be the measure of economic redress for the complainants, calculated with interest from January 1, 1980 to the present. Upon questioning from the Board counsel for the complainants indicated, as at the date of hearing, that the global sum of compensation payable pursuant to that formula would be approximately \$152,000.

10. On behalf of the complainants, counsel also urged the Board to order the payment of legal costs, maintaining that the monies expended to obtain redress before the Board should be paid to the complainants to make them whole. He also submitted that, given the alienation of the complainants from the mainstream of Local 87, which he maintains actively worked against their interests throughout this complaint, they should be refunded all union dues which they have paid from the inception of the complaint.

11. Counsel for the respondent union argues emphatically that there should be no compensation paid to the complainants in the instant case. He expresses that there is no basis to conclude that if the violation of the duty of fair representation found by the Board had not occurred that the complainants would have succeeded in having the general membership ratify a collective agreement whose terms would be more favourable to them. Counsel for the respondent notes that the general membership had previously discussed the relative merits of percentage increases as opposed to dollars and cents across the board and had given the bargaining committee a mandate based on the general rejection of percentage increases in both years of the collective agreement. He also stressed that the parts of the City offer which was not disclosed at the general meeting were subsequently made known by the City in advance of the final ratification meeting. That knowledge made no difference to the outcome. In other words, according to the respondent union, the breach of the duty of fair representation which occurred when the members of the bargaining committee failed to candidly respond to questions from the general membership has not been shown to have caused any real economic loss to any of the complainants. At most, it is submitted, they lost the opportunity to make full argument to the general membership on the merits of the undisclosed alternative offer from the City. Since that formula had already been rejected after full discussion by the general membership, and was not embraced after the City's disclosures, the respondent union maintains that no causal link is established in the evidence to show that any financial loss has resulted to the complainants.

12. Counsel for the union also stresses the more generous provisions of the most recent collective agreement, made after the complaint was filed, as it affects the technical and professional employees. He emphasizes that the present collective agreement contains a wage provision incorporating a sliding scale for wage increases in the initial year, with a substantial extra benefit to the higher rated employees. The second stage of the wage package incorporates a percentage increase across the Board. Counsel for the respondent union submits that both of these wage factors in the new collective agreement represent important gains for the complainants and demonstrate the willingness of the local to rectify the wage compression which they have experienced.

13. Counsel also points to the conduct of the complainants themselves as a further basis for denying any compensation. He notes that the actions of Mr. Zapior and Mr. Roy, particularly in their disregard of the mandate of the bargaining committee, contributed to the climate of suspicion which eventually led to the impugned actions of the union's executive. Counsel for the respondent argues that the deliberate withdrawal of Roy and Zapior, as well as the complainants who sympathized with them, from the mainstream of the union contributed in large measure to their own misfortune. He submits that they withdrew from active participation in the local at their own peril, and should not now be heard to complain about their limited involvement in the executive structure over the last two years. Lastly, it was submitted on behalf of the respondent that the delay in the bringing of this complaint, which the Board has found to have occurred between June of 1980 and July of 1981 has not been adequately explained by the complainants and was in fact without any justification. Counsel for the respondent submits that to award compensation for that period of time would unduly prejudice the union.

14. On behalf of the respondent local it was argued that the sole form of redress in this complaint should be an order of the Board requiring the restructuring of the bargaining committee. Counsel for the union notes that the inside employees are fairly evenly distributed across the wage classifications from Group 2 through Group 11. He therefore proposes that the Board fashion an order which would require the respondent local to establish a five-person bargaining committee with one representative to be elected from each of Groups 2 and 3, Groups 4 and 5, Groups 6 and 7, Groups 8 and 9 and Groups 10 and 11 respectively. According to counsel for the respondent union that would ensure a representation of the interests of the employees in each level of the wage classifications. More importantly, it would allow the complainants the opportunity to elect their own representative to the bargaining committee from the higher rated wage classifications in which their numbers predominate.

15. We turn to consider the merits of the submissions made to the Board. Of paramount concern is the possibility of severing the existing unit of office and clerical employees, or "inside employees", as they are generally known. In any application for certification it is the obligation of the Board to consider what deliniation of employees will be suited to collective bargaining as a group. While the Board has noted that it must not necessarily select the ideal bargaining unit designation, it does strive, insofar as possible, to fashion and preserve the most comprehensive unit of employees which will constitute a viable bargaining structure. The wish for self-determination on the part of a group of employees is a factor to be considered among others, but it is not the determining factor in all cases. (*McDonald's Restaurants of Canada Ltd.*, [1974] OLRB Rep. Oct. 755; *Ponderosa Steak House*, [1974] OLRB Rep. Nov. 7; *Canada Trustco Mortgage Co.*, [1977] OLRB Rep. June 330 and see also *Parnell Foods Ltd.*, [1969] OLRB Rep. Apr. 38; *Stratford General Hospital*, [1976] OLRB Rep. Sept. 459.)

16. This is not the first time the Board has been requested by a group of technical and professional employees to give them separate representation for the purposes of collective bargaining. In the *Stratford General Hospital* case (*supra*) the Board examined at some length the merits of fragmenting bargaining units to accommodate the perceived separate interests of professional and para-professional employees. While that case dealt with technical and professional employees in a hospital setting, the collective bargaining concerns raised in the instant case are not dissimilar. One important difference is that in this case the bargaining structure

incorporating the professional and technical employees along with the office and clerical employees has held for a substantial number of years, apparently without serious difficulty prior to the specific circumstances giving rise to this complaint.

17. We are also satisfied that the lines of distinction between the technical employees and the clerical employees in the instant case is, if anything, less significant than the lines which the Board found unconvincing as a basis to separate the various groups of professional and para-professional employees in the hospital setting in the *Stratford* case. We find it difficult, for example, to distinguish between the senior utilities clerk, who is in charge of collecting water bill arrears and is proposed to be included in the unit of technical employees, and the tax clerk, who collects business tax accounts and is sought to be excluded by the applicant. Even where broader distinctions are found, such as between a draftsman and a clerk typist, or between a social worker and a bookkeeper, the Board's overall sense is that they share fundamental employment interests that transcend the differences in their specific duties and responsibilities. Moreover, it is not without significance that the range of employees found in the existing bargaining unit of inside employees were represented together, apparently without incident for a substantial number of years, prior to the specific flare up that precipitated this case. In these circumstances the Board would be disposed to disturb the established bargaining unit only as a last resort, if it were satisfied that the failure of representation which occurred could not be corrected by some less drastic form of remedial redress.

18. Has there been a fundamental failure to represent the professional and technical employees that would justify the termination of the inside bargaining unit in its present form? In our view, the events giving rise to this complaint and application for certification can fairly be characterized as more of a skirmish than a war, more of a contest of personalities than groups. As we noted in our prior decision the decade between 1970 and 1980 saw some compression of wages in the higher rated categories of employees in the bargaining unit. While the Board does not disregard the impact of that development on the complainant employees, it should be noted that it was the City, and not the employees themselves, that initiated bargaining proposals to correct the imbalance. While the initial effort by the City was not successful, evidence respecting the most recent collective agreement indicates that substantial initiatives have been undertaken to restore the wage differentials in the inside bargaining unit in Thunder Bay to some reasonable comparability to differentials found in other municipalities in the province. In other words, while a tension may have developed over the issue of compression and the initial attempt at corrective action was not successful, the beginnings of a restorative process seems nevertheless to be under way within the framework of the existing bargaining unit.

19. On the whole, the dispute before the Board stems primarily from the conflict between several individuals in relation to one set of events. It is, in other words, a conflict more personal than institutional. Much of the mistrust and misunderstanding which precipitated this complaint originated in the bitter personal conflict between Mr. Roy and Mr. Zapior, on the one hand, and Ms. Rice and Ms. Parker on the other. The evidence now establishes that Ms. Rice and Ms. Parker, whose actions we found to be in breach of the duty of fair representation, no longer hold any union office. While the feud among these individuals did spread its bitterness to others in the bargaining unit, it appears to the Board that the new union executive is in a position to heal the old wounds and make a new beginning. We are fortified in that conclusion by the catch-up provisions for the complainant employees reflected in the sliding scale wage formula incorporated into the most recent collective agreement.

20. While the improvements of one agreement may not be conclusive proof that the dissident employees will henceforth get representation more sensitive to their interests, it is a positive indication that the existing wounds can be healed. The collective bargaining process, including the section 68 complaint, appears to have led to some substantial correction in the wage differential of the higher rated employees in the bargaining unit. The Board is not unmindful that the instant complaint may have been instrumental in redirecting the course of events in a way favourable to the complainant employees. We do not believe that that should be held against the respondent union. Corrective action in the face of a complaint should always be hoped for. That very development is within the scheme of accommodative solutions to disputes contemplated in the provisions of the *Labour Relations Act*. There is, on the whole, substantial evidence to suggest that the bargaining unit as it is presently constituted can and will function effectively to represent the various interests of the employees within it.

21. Of natural concern for the Board is the viability of a bargaining unit restricted in its membership to technical and professional employees of the City of Thunder Bay. Presently the City bargains with three units of employees, being the inside and the outside work force and the library employees. For the Board to accept the position of the applicant for certification would create a fourth bargaining unit composed of one segment of inside employees. That unit would be created at the expense of virtually halving the present bargaining strength of the office, technical and clerical employees. The viability of a unit so fragmented is in serious question. Of equal importance, the City would be required to incur the time and expense of a fourth set of negotiations and ongoing relations with yet another bargaining agent as collective agreements are successively renewed.

22. A separate concern is the jeopardy to job mobility inherent in a two unit structure. It is not disputed that a number of the employees characterized by the applicant as technical or professional have no professional training or qualifications, and have themselves been promoted through the lower rated clerical ranks to the positions of responsibility which they now hold. The establishing of two different units, with separate seniority lists and protective promotion and job posting barriers could substantially reduce the job mobility of numbers of employees in the existing bargaining unit. By the same token, it would limit the flexibility which the employer now has in promoting a broader career path for its inside employees.

23. One final concern is the interest of industrial stability in the operations of a substantial public sector employer. A municipality such as the respondent in this application provides a range of services to the public. Some of the services it provides are critical to local industrial and commercial activity. While these are not legislatively designated as essential services, nevertheless a labour board dealing with municipal bargaining units must be mindful of preserving rational and comprehensive bargaining structure which will conduce to a minimum of interruptions of service. Doubling the number of bargaining units for the inside workers, with the attendant risk for greater disruptions of service in the event of strikes, raises serious concerns for the general public interest (cf. *Insurance Corporation of British Columbia*, [1974] 1 C.L.R.B. Rep. 403 (B.C.L.R.B.); *B.C. Ferry Corporation*, [1977] 1 C.L.R.B. Rep. 526). Uncertainty in respect of the stability of bargaining is further raised by both the recent proliferation of technical and professional specializations, and the already segmented nature of municipal management (see, generally, Adams, "Collective Bargaining by Salaried Professionals" (1977) 32 I.R. 184; Kochan "City Employee Bargaining with a Divided Management" (1971, University of Wisconsin Press) and Simmons "Collective Bargaining at the

Municipal Government Level in Canada'', (Draft study for the task force on labour relations, Privy Council Office, 1968)).

24. The Board does not view these as attractive alternatives. If we were satisfied that the interests of the complainant employees could not be fairly represented within the context of the larger bargaining unit we would not shrink from adopting the bargaining structure proposed by the applicant association. On the whole of the evidence before us, however, we are not satisfied that that formula, fraught as it is with difficulties, is either necessary or appropriate in the circumstances of this case. We are satisfied that the interests of the technical and professional employees who are complainants in the section 68 complaint can be adequately redressed by a significant remedial order under section 89. We cannot conclude on the material before us that there has been an overall failure of representation so fundamental that the bargaining unit itself should be permanently dismantled. We are satisfied that the unit as presently constituted remains the unit appropriate for collective bargaining. Given that the membership evidence submitted by the applicant association represents less than forty-five per cent of the existing bargaining unit on the date of the application, the application for certification must be dismissed.

25. We turn to consider the remedy appropriate to redress the violation of section 68 found to have been committed by the respondent union and the members of its executive. We deal firstly with the issue of compensation. The Board finds substantial merit in the submission of counsel for the respondent union that the evidence falls short of establishing any meaningful causal link between the wage settlement finally adopted by the union and the actions which we have found to be inconsistent with the duty of fair representation. As noted in the Board's earlier decision on the merits of the complaint, Mr. Roy and Mr. Zapior had every opportunity to persuade the general membership of the merits of an across the board percentage increase. This in fact was done at a general meeting which subsequently rejected the view which they advanced, and conferred a different mandate upon the bargaining committee. There is little, if any, reason to believe that the general membership would have come to any different conclusion if there had been a disclosure at the subsequent general meeting of the alternate offer of the City for a wage increase in terms of percentage across the board. We are fortified in that conclusion by the fact that when the City itself made its alternate offer known directly to the employees in advance of the union's final ratification vote, it made no significant difference.

26. While the Board has indicated that where appropriate compensation will be awarded in respect of lost opportunity, the value of the opportunity lost must be realistically assessed, and the amount of compensation awarded must be a fair reflection of that value. Compensation for lost opportunity, like all heads of compensation, should not amount to punitive or exemplary damages, nor should it be a windfall which would not in any event have been enjoyed by the complaining party.

27. We are compelled to conclude, on the balance of probabilities, that no practical difference would have resulted if Ms. Rice and the other members of the bargaining committee had disclosed the alternative offer when they were asked about it in the general membership meeting by Mr. Roy and Mr. Zapior. In other words, we are satisfied, on the preponderance of the evidence, that the wage outcome affecting the complainants did not flow from the violation of the duty of fair representation. We also doubt the remedial value of making an order of compensation which would, in effect, amount to a transfer of money from one group of

employees to another. The wage compression itself was not a violation of the Act. The duty of fair representation was breached by the misrepresentation and procedural maneuvering of a small group of individuals who have since forfeited their office. In these circumstances, the payment of damages sought by the complainants would be tantamount to compensating them for their losses resulting from wage compression. Moreover, given our conclusion that the bargaining unit should not be severed, we must have additional concerns. Any compensation ordered would be paid by the members of the Local. In these circumstances we seriously doubt the wisdom of an order whose practical effect will be to take money from one group of employees – who did not themselves commit the unfair labour practice – and put it into the pocket of the complainants. Quite apart from the impropriety of that order, it would in all likelihood exacerbate rather than heal the differences between these two groups. It would have a negative effect from a labour relations standpoint. In light of the Board's conclusion on the issue of compensation it is not necessary to deal with the alternative argument of the respondent union in respect of delay.

28. We have more difficulty still with the submission of counsel for the complainants that they should be reimbursed for union dues paid since the inception of their grievance. There is no evidence to suggest that they have not continued to have the benefit of union representation during that time. On the contrary, as noted above, a collective agreement with substantial special benefits for the complainant employees has been concluded in the interim. If the complainants withdrew from active involvement in the day-to-day affairs of the respondent local, they did so at their own risk. The collection of dues is essential to the successful operation of any union, and to allow that head of recovery would, in our view, unduly penalize the respondent union and its members and would confer a windfall on the complainants. For reasons elaborated in previous Board decisions, we are also not of the view that this is a case in which the Board should make any order in respect of costs. (*Repac Construction & Materials Ltd.*, [1976] OLRB Rep. Oct. 610; *The New Gregory House Inc.*, [1980] OLRB Rep. June 873 at pp 874-75).

29. A remedial order under section 89 of the Act should be fashioned to respond to the particular circumstances of the case. The many kinds of problems and complaints that can arise in the collective bargaining context are not susceptible to redress by a limited number of boilerplate remedies, (*Radio Shack*, [1979] OLRB Rep. Dec. 1220). In this case the Board concludes that the problem is one of communication and trust. For the reasons elaborated in the Board's earlier decision, a segment of employees in the bargaining unit have lost confidence in the truth of what they are being told by the members of the inside bargaining committee and have consequently lost faith in the ratification process conducted by the local. The extent of that concern caused some 75 employees to form a separate association, file a complaint under section 68 of the Act and seek certification as a union in their own right. While, as the Board has noted, we do not feel that this is an appropriate circumstance to fragment the existing bargaining unit, we are equally satisfied that the legitimate concerns of the complainant employees can be satisfactorily protected by a remedial order pursuant to the section 68 complaint.

30. The collective bargaining problems underlying the complaint and application for certification are not unprecedented. The technical and professional employees of the City feel that their special interests have not been sufficiently appreciated and protected by the respondent local, principally because it has been influenced by the majoritarian interests of the clerical employees. The concern of the minority group in this case is analogous to the special concerns

of skilled employees in established crafts who form part of a larger bargaining unit of production employees represented by an industrial union. The tension between industrial and craft interests has been a recurring theme in the history of the North America labour movement, although the old rivalries between craft and industrial unions substantially abated with the merger of the A.F.L. and C.I.O. in the United States and the emergence of the C.L.C. in Canada. More recently, the issue of accommodating the interests of skilled trades within an industrial bargaining unit has come to be resolved within the framework of the individual trade unions. Some unions have responded by giving to skilled members a number of guaranteed seats on their general policy-making bodies. Others have made constitutional provisions for the participation of special representatives of the skilled trades in the negotiation of collective agreements, notably in the auto industry. In some circumstances craft participation in industrial union government has been implemented by setting up separate locals for some categories of skilled employees. The mainstream of the union movement, however, appears to favour the representation of the skilled trades within the context of larger industrial bargaining units, with special provisions to protect their interests. (See, generally, Webber "The Craft-Industrial Issue Revisited: A Study of Union Government", (1963) 16 *Industrial and Labour Relations Review*, 381.) While the circumstances of the instant case may not precisely parallel those that led to corrective action to protect the interests of the skilled trades within the industrial unions, we find the history of industrial bargaining units helpful in thinking about the problems that have led to this complaint. Experience has shown that divergent employee interests can be accommodated within a comprehensive bargaining structure. The lessons learned in the blue collar sector may be instructive in resolving comparable problems that may arise among white collar employees.

31. The remedial challenge in the instant case is to restore trust and accountability in the process surrounding the negotiation and ratification of the collective agreement. The Board agrees with counsel for the respondent union that this can be best achieved by implementing special protections for the complainant employees at the level of the bargaining committee structure. A system of proportional representation, requiring that the bargaining committee be composed of five members separately elected from different tiers of the wage grid should be implemented forthwith. That will insure that the complainants, who are the minority in the overall unit but are an overwhelming majority in the higher paid wage categories, will have a meaningful place at the bargaining table.

32. In a bargaining committee so structured the employees in the higher rated groups will be assured representation of their interest in a number of important ways. Through their own representatives they will be involved from the outset in the formulation of the union's bargaining objectives. They will have a hand in framing the positions and responses which are adopted by the union as bargaining progresses. They will have input into the way in which the union's demands and arguments are put to the employer's bargaining representatives. Perhaps most importantly for the concerns of the complainants in this case, they will witness firsthand the employer's responses and will be privy to the terms of any offer which it makes. Lastly, they will be in a position to insure faithful reports to the general membership on the state of negotiations and the terms of any outstanding offer. They will, in short, be in a position to insure that the events which led to this complaint do not happen again. The bargaining committee so structured will avoid the possibility of either deliberate or indifferent misinformation of the technical and professional members of the bargaining unit in the negotiation of a collective agreement.

33. A Board remedy should, insofar as possible, not interfere unduly with the long term prerogatives of an employer or a union to manage its own affairs. In our view, however, the adjustment in the composition of the bargaining committee suggested by the local should be implemented on a permanent basis to ensure adequate representation of the interests of all employees in the bargaining unit.

34. We are also of the view that this is an appropriate case to order a posting. A public statement posted and mailed to all members of the local, signed by its president, acknowledging the violation of the Act found by the Board and undertaking to observe the duty of fair representation in the future should contribute substantially to restoring the confidence of the complainants in the willingness and ability of the union to fairly represent them.

35. It is the Board's judgement that the foregoing remedies will redress the excesses and mistrust of the past and that the prognosis for the future of the bargaining unit is good. That view is fortified by the substantial special wage gains which the local made for the complainant employees in the last round of negotiations and, secondly, the complete change in the composition of the local's executive which has taken place since the events giving rise to this complaint. In light of these events we have every reason to believe that the complainants will be fairly represented in the future. Should our confidence in this regard prove wrong, more extreme corrective measures will be available.

36. For the foregoing reasons, therefore, the Board orders as follows:

- (1) (a) The bargaining committee of the local shall be restructured to be composed of five representatives with one representative from each of classification Groups 2 and 3, Groups 4 and 5, Groups 6 and 7, Groups 8 and 9 and Groups 10 and 11 respectively. Should the foregoing classifications be changed, a similar formula to insure proportional representation shall be adopted, *mutatis mutandis*.
- (b) Ballots for the election of each group representative shall be cast exclusively by employees within the affected groups. The five representatives so chosen shall be voting members of the committee. They shall elect a chairperson from among their number as well as such other officers as the local may, through its by-laws, deem appropriate. The foregoing provisions shall not abrogate or limit the attendance at bargaining committee meetings of such other observers or resource persons as may be provided in the constitution and by-laws of the Local union.
- (2) A notice in the form of "Appendix A", signed by the President of the local, shall be sent by the respondent Local 87 by prepaid mail to each member of the inside bargaining unit and shall be prominently posted for 60 consecutive working days on any notice board in the workplace normally used for the posting of union notices or bulletins.

36. The Board remains seized of this complaint in the event of any dispute between the parties with respect to the interpretation or implementation of its remedial order.

DECISION OF BOARD MEMBER J. A. RONSON;

1. In my earlier decision in this matter I concluded that the complainants sustained real and substantial harm when the local union removed Messrs. Zapior and Roy from the bargaining committee and then compounded the harm by refusing to disclose to the local membership the full offer made by the employer. I found there was a fundamental failure by the local union to represent the complainants and protect their bargaining rights.

2. We are dealing not just with a conflict between personalities, but with a conflict between philosophies – i.e., who *deserves* the bigger slice of pie. Within the confines of a union bargaining unit, there can hardly be a conflict that is more “institutional” in nature.

3. But for one aspect (which I will come back to) I agree with the remedies ordered by my colleagues. But I do have reservations: given the attitude of the persons who testified and human nature being what it is, there is going to have to be a marked change in those attitudes by all concerned in order for collective bargaining to work. Having tried to work within the rules framework of their local union, and having been clubbed by the majority of their fellow employees in total disregard of those same rules, the complainants will be most concerned at having to bargain within the same majoritarian framework. The resolution of the problems in this local will require the fastidious exercise of good faith between the local union and the complainants and between all groups of employees in the particular bargaining unit.

4. I would go further than my colleagues and award the complainants damages for the harm suffered. The recent decision of the Board in *Consolidated Bathurst Packaging Ltd.* [1984] OLRB Rep. Mar. 422 reiterates the Board’s position about assessing the loss of opportunity to negotiate a collective agreement when that loss was occasioned by a breach of the Act. In order to award damages in such a situation the Board applied the reasoning of the Supreme Court of Canada in *Kenkel et al v. Hyman et al* [1939] 4 D.L.R. 1 found at page 7:

“For my part I can find no authority in either *Chaplin v. Hicks* or *Carson v. Willits* justifying any Court in awarding any more than a nominal sum as damages for loss of a mere change of possible benefit *except upon evidence proving that there was some reasonable probability of the plaintiff realizing therefrom an advantage of some real substantial monetary value.*”

(emphasis added).

The reasonable probability of monetary advantage must be assessed as of the instant immediately preceding the unlawful actions by the local union. To consider what occurred shortly thereafter is to allow the local union to benefit from the illegality.

5. Is there evidence from which it can be concluded that the complainants had a reasonable possibility of concluding a better deal for themselves in the collective agreement? I so conclude based on the following:

(a) the employer agreed with the efforts of Zapior and Roy to alleviate the wage compression;

(b) if the local union felt the membership would not act to reduce compression, why did it withhold the full offer from its members; and

(c) the most recent collective agreement contains more generous provisions as it affects the technical and professional employees.

6. There is no reason why the Board should hesitate to award damages in this case on the same basis as in *Consolidated Bathurst Packaging Ltd.*, *supra*, unless it is for some policy reason as alluded to by the Board in *Canada Cement Lefarge Ltd.*, [1981] OLRB Rep. Dec. 1722. If so, the applicable parameters of that policy should be delineated.

7. I would further award the complainants the damages calculated as set out in paragraph 9 of my colleagues' decision, totalling approximately \$152,000 with the Board remaining seized should the parties not be able to agree on the exact quantum of damages.

Appendix "A"

The Labour Relations Act

NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

WE, LOCAL 87, CANADIAN UNION OF PUBLIC EMPLOYEES, HAVE ISSUED THIS NOTICE IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD ISSUED AFTER A HEARING IN WHICH WE PARTICIPATED. THE ONTARIO LABOUR RELATIONS BOARD FOUND THAT WE VIOLATED THE LABOUR RELATIONS ACT AND HAS ORDERED US TO INFORM ALL EMPLOYEES IN THE INSIDE BARGAINING UNIT OF THE CITY OF THUNDER BAY OF THEIR RIGHTS:

THE ACT GIVES INDIVIDUAL EMPLOYEES THESE RIGHTS:

TO BE REPRESENTED BY A TRADE UNION AND TO PARTICIPATE IN ITS LAWFUL ACTIVITIES.

TO BE REPRESENTED BY A TRADE UNION IN A WAY THAT IS NOT ARBITRARY, DISCRIMINATORY OR IN BAD FAITH.

WE ASSURE ALL EMPLOYEES IN THE INSIDE BARGAINING UNIT OF THE CITY OF THUNDER BAY REPRESENTED BY LOCAL 87 OF THE CANADIAN UNION OF PUBLIC EMPLOYEES THAT:

WE WILL NOT DO ANYTHING THAT INTERFERES WITH THESE RIGHTS.

WE WILL NOT ENGAGE IN MISREPRESENTATION OR PROCEDURAL MEASURES THAT RESTRICT THE RIGHTS OF ANY EMPLOYEES TO PARTICIPATE IN THE PROCESS OF COLLECTIVE BARGAINING.

WE WILL NOT ENGAGE IN ANY CONDUCT THAT IS ARBITRARY, DISCRIMINATORY OR IN BAD FAITH IN THE REPRESENTATION OF ANY EMPLOYEES.

WE WILL IMPLEMENT THE RESTRUCTURING OF THE BARGAINING COMMITTEE FOR THE INSIDE BARGAINING UNIT AS ORDERED BY THE BOARD.

LOCAL 87, CANADIAN UNION OF
PUBLIC EMPLOYEES

PER: _____
PRESIDENT

This is an official notice of the Board and must not be removed or defaced

This notice must remain posted for 60 consecutive working days.

1463-83-R Retail Wholesale and Department Store Union Local 414, Applicant, v. 555190 Ontario Ltd. carrying on business as **Valencia Foods**, Respondent

Sale of a Business – Dominion closing store and surrendering – Valencia obtaining lease of closed premises and purchasing some of Dominion's assets in unrelated and unconditional transactions – 4 1/2 month hiatus before opening of Valencia store – No management or employees of Dominion absorbed – Store similar to pre-existing Valencia stores – Acquisition of premises of retail food store not conclusive of sale of business – No sale but expansion of existing business

BEFORE: Owen V. Gray, Vice-Chairman and Board Members J. A. Ronson and W. F. Rutherford.

APPEARANCES: *David I. Bloom and Bob Mackay for the applicant; Roy C. Fillion, Q.C. and Robert E. Salisbury for the respondent.*

DECISION OF THE BOARD; May 9, 1984

1. The name of the respondent is amended to read: "555190 Ontario Ltd. carrying on business as Valencia Foods".
2. This application focuses on a building in Martingrove Shopping Centre, a small shopping plaza in the City of Etobicoke in the Municipality of Metropolitan Toronto. For many years, Dominion Stores Limited ("Dominion") operated a retail food store in that building. That store closed April 30, 1983. The respondent opened a retail food store in the same premises on September 14, 1983. The applicant trade union says that Dominion has sold to the respondent that part of its business formerly conducted in the subject building. It asks for a declaration that, pursuant to section 63 of the *Labour Relations Act*, the respondent is bound by the terms of the applicant's current collective agreement with Dominion, which applies to all employees of Dominion at its stores in various municipalities including the Municipality of Metropolitan Toronto. The respondent denies that there has been a sale of business within the meaning of section 63 of the Act. A group of its employees filed a petition opposing this application. Several employees attended on the first day of hearing. They were asked by the Board whether they wished to take any formal part in the proceedings. None asked to intervene; one told the Board that the employees were content to leave the defence of the application to the respondent.
3. Martingrove Shopping Centre consists of two buildings connected by a mall and surrounded by a parking lot, occupying together a site of approximately three acres bounded on all four sides by municipal streets. One building contains about 12,400 square feet of retail space at ground level, occupied at the time the application was heard by a barber shop/beauty parlour, bakery, ladies' wear store, dry cleaners, video movie retail outlet and Chinese restaurant; this building also has a second storey of about 7,700 square feet subdivided into a half dozen offices. The other building contains approximately 16,000 square feet. It was leased by Dominion in 1968 for a 20-year term, with four consecutive options to renew for further 5-year terms at the original rent. Only escalation of property taxes was the subject of any "pass through" to the tenant under that lease. By 1976, when Victern Developments Limited ("Victern") bought the plaza and became Dominion's landlord, this lease was financially unattractive from a landlord's perspective and promised to be increasingly so as the years went

on. Sid Sitzer, the principal of Victern, took this into account when negotiating the price paid for the plaza. At that time, Sitzer believed the premises would become increasingly uneconomic for Dominion, despite the attractive rent. To his knowledge, a typical Dominion store operation in 1976 occupied 40,000 or more square feet. There would, he thought, be diseconomies of scale in trying to conduct a full Dominion store operation in 16,000 square feet of space. He thought Dominion would be ready to give up the lease before the end of its term.

4. Mr. Sitzer's initial impression was borne out. As time went on it appeared that Dominion was not devoting much energy or attention to the promotion of business at this location. Sitzer could see that customer traffic in the Dominion store was light. The ancillary retail tenants were complaining that the Dominion store was doing nothing to attract business; their sales were down as a consequence, as Sitzer knew because their rent (unlike Dominion's) was tied to their gross sales. Sitzer wrote to Dominion in July, 1982. He said he had in mind renovations to Martingrove Shopping Centre which would require demolition of the building occupied there by Dominion. He invited Dominion to discuss the terms of a surrender of lease. Dominion was receptive. By November, 1982, Dominion had agreed in principle to a surrender, on terms still to be negotiated. The most substantial outstanding term was the amount to be paid by Victern for the surrender. Negotiations continued in the new year, and concluded on March 17, 1983, in an oral agreement between A. D. Titherington on behalf of Dominion and Annette Ross, Sitzer's sister and Victern's property manager, on behalf of Victern. The agreement fixed the amount to be paid by Victern to Dominion, and required that Dominion remove its trade, fixtures and equipment from the location and deliver vacant possession of the premises in a "broom-swept condition" by May 20, 1983. This agreement was reduced to writing in a letter dated March 22, 1983 from Dominion to Victern.

5. In late 1982, after Dominion had agreed in principle to a surrender of its lease and before the terms of the surrender were settled, Sitzer began to hear rumours from his other tenants that Dominion was moving out, and Victern began receiving inquiries about the Dominion store space. He had by this point abandoned his earlier plan for major reconstruction of the plaza. He now contemplated renovating and subdividing the Dominion store space into smaller units for which he intended to seek a butcher, a baker, a fruit and vegetable shop, and similar operations as suitable tenants. His discussions with Dominion were ongoing, however, and Victern was unable to tell any prospective tenant that all or any of the Dominion store space was or would later be available. It was at this point that Valencia Foods first entered the picture.

6. Valencia Foods is a trade name used by the respondent and its two sister companies: 359906 Ontario Limited and Valencia Foods Inc. The shares of all three companies are owned by members of the Troiani family, of which Pompeo Troiani is the patriarch. Valencia Foods has operated a 13,000 square foot supermarket on Sheppard Avenue near Jane Street in Metropolitan Toronto for approximately six years; a second supermarket of about 10,000 square feet was opened in February, 1980 in a plaza near Highway 7 and Islington Avenue in Woodbridge, just to the north of Metropolitan Toronto. Both locations cater particularly to what was described as the "Italian" market. Pompeo Troiani has been doing business in the food industry "in the Italian way" since 1956. Valencia Foods' stores carry the products Mr. Troiani believes Italian people want. The stores carry more and different products than would be found in a conventional food store of the same or even larger size; this is especially so with respect

to cheeses, meats, fruit and fresh produce. The predominant language spoken in Valencia Foods' stores between staff and customers is Italian.

7. As head of the family, Pompeo Troiani is in charge of seeking out locations for new Valencia Foods' stores. He looks for locations near Italian neighbourhoods. In very early 1983, he noticed that houses were going up in an area near where he lives and, it turns out, near the shopping plaza in question. One day in February, 1983, he went to an Italian real estate office to ask what sort of people were buying those houses. He was told that 90 per cent of the purchasers were Italian. He spent more time exploring the area. He saw the Martingrove Shopping Centre, and went in to take a look. He noticed that the barber was Italian and engaged him in conversation, asking how business was. The barber said that business was dead, that the Dominion Store across the mall was closing and no one seemed to want to come into the shopping centre. Troiani asked how the barber knew that the Dominion Store was closing; the barber said there was a rumour to that effect. Troiani asked who the landlord was, and the barber gave him Victern's telephone number and Annette Ross' name. When he got back to his office, Mr. Troiani asked his son, Frank, to call Victern. Frank Troiani contacted Annette Ross by telephone. He asked about the availability of the Dominion Store space in the Martingrove Shopping Centre. Ms. Ross said there was no space available at that time. As there were no signs at the plaza to prompt such an enquiry, Ms. Ross asked Frank how he had heard about the centre. Frank told her about the barber's rumour. Frank followed up with a letter confirming the interest of Valencia Foods in renting space in the Martingrove Shopping Centre. He requested a meeting. Ms. Ross was impressed, and arranged to meet with Frank and Pompeo Troiani on February 17, 1983.

8. At the meeting of February 17, 1983, the Troiani's told Ms. Ross about the Valencia Foods operation, its size and existing locations and the amount of business done in those locations. Ms. Ross concluded that Valencia Foods was a desirable prospective tenant, and had it in mind to attract them to this or some other location managed or developed by Victern. While rumours about the Dominion Store space had prompted many inquiries, there had been only one other approach which Ms. Ross had taken seriously, and that was by a real estate agent acting on behalf of an as yet undisclosed client. Ms. Ross did not negotiate terms of lease of the Dominion store premises with Valencia at this meeting. Those premises were not yet available. Moreover, Sitzer was still planning to subdivide the Dominion store space; Valencia, on the other hand, wanted at least 12,000 square feet, and preferably the full 16,000 square feet, if the Dominion store premises became available. Sitzer was leaving in late February on an extended trip out of the country. Ross thought he should meet the Troiani's before he left.

9. Sitzer met the Troiani's briefly on or shortly before the day he left the country. In this or the earlier meeting with Ms. Ross, the Troiani's made it clear that their operation would include a bakery, a fresh produce section and a full service meat counter. These were elements Sitzer had in mind for subdivided units in the Dominion store space, once that space became available. The Troiani's were trying to persuade Sitzer that he could accomplish his objectives by renting to them when the space became available. Neither Ross nor Sitzer made any commitment to the Troiani's at this meeting, which was quite short. Sitzer was impressed with the Troiani's however. While subdivided space would attract more rent per square foot than undivided space, there were other factors for Sitzer to consider. On balance, Sitzer decided he would be prepared rent the entire Dominion store space to Valencia when it came available, if the price were right. He made this decision after his meeting with the Troiani's and before

March 17. Sitzer gave Ross instructions on the negotiations with Dominion before he left the country, and in periodic telephone conversations thereafter. By the same means, and before March 17, he also instructed her on the position to take with Valencia.

10. Victern had no further contact with Valencia until after March 17, 1983, when Ross concluded the surrender terms with Dominion. Annette Ross then contacted the Troiani's, met with them and negotiated the terms of a lease of the space Dominion had agreed to surrender. An offer to lease was prepared on Victern's standard form and sent to Valencia for execution on March 22, 1983. Mr. Troiani amended the document in accordance with his lawyer's advice, executed it, and returned it to Victern. It was not signed on behalf of Victern until after Victern received the letter from Dominion of March 22, 1983, confirming the terms of the surrender agreement. The tenant named in the agreement to lease is "359906 Ontario Limited trading as Valencia Foods". The Board was told that the respondent's sister company executed the agreement because the respondent had not yet been incorporated for the purpose of operating the Valencia Foods store at the subject location. The formal lease, prepared later, was executed by the respondent itself. The parties are agreed that we should ignore the separate existence and involvement of the intermediary, and deal with these facts as though the actions of the Troiani's were actions on behalf of the named respondent at all material times.

11. After the agreement to lease was entered into, Mr. Troiani started making plans to equip and renovate the subject premises. In early May he became aware from his refrigeration supplier that Dominion was selling some of the equipment it had used at the subject premises, as well as equipment located at a Victoria Park store which Dominion was also closing at that time. The Troiani's submitted to Dominion a list of the equipment Valencia wanted to buy, then learned that some of that equipment had already been sold. On May 9, 1983, Valencia purchased a great deal of the equipment which remained unsold at the subject premises, for a price of \$56,000. This amount was less than 15 per cent of the total amount paid by Valencia to equip and renovate the building for operation as a Valencia Foods store. Victern played no part in the dealings between Valencia and Dominion. Victern only became aware of those dealings when it received Dominion's draft surrender of lease, in which Victern's requirement that the premises be left in a broom-swept condition had been modified by Dominion to give it the right to leave on the premises the fixtures it had sold to Valencia.

12. The respondent's new Valencia Foods store opened September 14, 1983. The store's store manager, bookkeepers, department heads and a number of its senior clerks, a total of 15 employees, came from Valencia Foods' other two operating stores. The balance of the 50 full-time and part-time employees ultimately employed at the store were hired from among persons who responded to a sign put up in the store premises two or three weeks before the opening. Between fifty and one hundred people responded to that sign by submitting job applications. None of those applicants listed the subject Dominion Store as a prior employer.

13. Since the opening, Valencia Foods has operated the new store in the same manner as its other two stores. The new store advertised in local weekly newspapers in the English language. The other two stores are mentioned in that advertising. All three stores advertised and still advertise in Italian language print and electronic media: *Corriere Canadese* and CHIN Radio. All three stores enjoy common administration, and centralized purchasing for all but a few small items.

14. The applicant did not name Dominion Stores Limited as a respondent; no one gave

evidence on Dominion's behalf. The applicant subpoenaed and interviewed Mr. Titherington, the Dominion employee most familiar with the lease surrender negotiations. Mr. Titherington was not called as a witness. The applicant also subpoenaed and interviewed Mr. Field, the Dominion employee familiar with the sale of store fixtures to Valencia. Mr. Field was not called as a witness. About Dominion's operations at Martingrove Shopping Centre prior to the surrender of the lease, we have only Mr. Sitzer's observations. About Dominion's operations following the surrender, we know from Mr. Troiani that after he opened the store in the Martingrove Shopping Centre he found that there was a Dominion store operating a couple of miles south of Albion Road on Kipling Avenue, which we note would be a drive of about 4 miles from the subject site. From the cross-examination of the applicant's business agent, Robert McKay, we know that employees of Dominion at the closed store were absorbed into other Dominion stores pursuant to the provisions of the applicant's collective agreement with Dominion. Although Mr. McKay thought there might have been some employees who had been denied that opportunity or did not qualify for it, he was unable to name one.

II

15. Counsel for the respondent argued that the opening of his client's store in the Martingrove Shopping Centre represented the expansion of its existing, parallel business, not the purchase of a part of Dominion's business. He emphasized the differences between the Dominion operation and the respondent's "Italian" operation, and noted that the managerial skills necessary to run the operation came entirely from the existing Valencia Foods operations, not from Dominion. He argued that the surrender of lease from Dominion to Victern, the lease from Victern to Valencia and the sale of fixtures from Dominion to Valencia were all independent transactions no one of which had been conditional on any of the others. He suggested this was one of several critical distinctions between the facts of this case and the facts in *More Groceteria Limited*, [1980] OLRB Rep. Apr. 486. Counsel noted that the origin of managerial skills and the unrelated nature of the succession of transactions by which the alleged successor obtains a business location were both important elements in the board's decision in *Calmil Enterprises*, [1980] OLRB Rep. Apr. 401.

16. Counsel for the respondent also argued that the facts in this case are on all fours with the facts in *Sunnybrook Food Market (Keele) Limited*, [1974] OLRB Rep. Jan. 47. In that case, A & P had operated a supermarket in Brampton from premises it occupied pursuant to a 10-year lease which included three extension options of 5 years each. Six months before the end of the initial 10 year term, A & P gave notice to the lessor that it would not be exercising its options. The reason A & P gave for this decision was that the premises were small and outmoded, and only marginally profitable. The respondent Sunnybrook came into the picture when it leased from A & P's landlord the premises occupied by A&P for a term commencing upon the expiry of A & P's lease. Sunnybrook had no dealings with A&P before committing itself to a lease of the premises, and there was no corporate relationship between A & P and either Sunnybrook or the landlord. A week after committing itself to the premises, Sunnybrook received a letter from A&P offering for sale the fixtures located in the subject premises. Sunnybrook accepted the offer, and acquired those fixtures. The Board rejected an application for a declaration that these transactions amounted to a sale to Sunnybrook of A & P's business. At paragraph 24 of the decision, the Board said:

We do not agree with the sweeping proposition advanced by counsel for the applicants that in the retail food market business, the business adheres

in the premises. In our view, the sale of fixtures by A & P to the respondent, in the circumstances of this application, was merely the sale of unwanted assets and was not the sale of a business within the meaning of section 55 [now 63] of the *Labour Relations Act*.

17. Counsel for the respondent also emphasized the 4-1/2 month hiatus between the closing of the Dominion store and the opening of the Valencia Foods store. He noted that such a hiatus had been an element considered by the Board in other retail food store cases including *Darrigo Consolidated Holdings Inc.*, [1980] OLRB Rep. Jan. 29, although he conceded that the hiatus in that case was greater than the hiatus here.

18. Counsel for the respondent noted that Dominion was still doing business in Etobicoke near the location in question. Noting also the applicant's failure to put Dominion's side of the story before the Board, he asked the Board to conclude that that side of the story would not have assisted the applicant in persuading the Board that a sale of business had occurred.

19. Counsel for the applicant observed that Dominion operated, and Valencia Foods operates, a retail food store. He emphasized the similarity of the work performed before and after the change in tenants, a consideration which he submitted is always given great weight, citing *Culverhouse Foods Limited*, [1976] OLRB Rep. Nov. 691. He pointed out that we have no evidence from which to assess what portion of the Valencia Foods operation is uniquely Italian and what portion involves the sale of goods similar to those sold in any supermarket operation. He cited *Yesteryear Grocers Inc.* [1982] OLRB Rep. Dec. 1975 for the proposition that a change in marketing concept should not lead to a finding that there had been a substantial change in the business. Counsel dwelt at length on the timing of the transactions between Victern and Dominion on the one hand, and between Victern and Valencia on the other. He likened Victern's role to that of a receiver, and suggested that its interest in these transactions had been more substantial than that of a landlord only. He argued it was important that during the negotiations between Victern and Dominion there had been occasional suggestions that various rights of first refusal might be granted to Dominion, and asked the Board to note that this possibility had been abandoned by Dominion when it finally made its agreement to surrender the lease.

20. Counsel for the applicant argued that the result and reasoning in *Calmil Enterprises* is to be confined to the unique facts of that case. He submitted that the *Sunnybrook* case could be distinguished on the basis that the landlord there had not actively solicited a surrender of lease by A&P. Responding to the argument that Dominion had remained in the market, counsel for the applicant argued that the market to be examined was the market in the immediate vicinity of the subject location, and did not extend so far as to include the Dominion store referred to in evidence by Mr. Troiani. He suggested that the *More Groceteria* decision supported an analysis of this sort, which he said should lead to a finding of sale of business on the basis of the locational analysis in *Dutch Boy Food Markets*, 65 CLLC ¶16,051. He argued that a hiatus of 4-1/2 months was not sufficient to impede a finding of sale of business, observing that longer periods of 7 months and 11-1/2 months had been involved in *Zehr's Markets Limited*, [1974] OLRB Rep. May 331 and *Darrigo Consolidated Holdings Inc.*, *supra*, respectively.

21. One of the points respondent's counsel dealt with in reply was the question of substantial change. He conceded that the differences between an operation like Valencia's and an

operation like Dominion's are not so substantial as to warrant an order pursuant to section 63(5) terminating bargaining rights if the Board found the respondent otherwise bound by such rights as a result of a sale of business. While not substantial in that sense, those differences were nevertheless relevant and significant, he argued, in assessing whether there had been a sale at all.

III

22. The relevant provisions of section 63 of the Act are as follows:

63.-(1) In this section,

- (a) "business" includes a part or parts thereof;
- (b) "sells" includes leases, transfers and any other manner of disposition, and "sold" and "sale" have corresponding meanings.

(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been a party thereto and, where an employer sells his business while an application for certification or termination of bargaining rights to which he is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if he were named as the employer in the application.

(3) Where an employer on behalf of whose employees a trade union or council of trade unions, as the case may be, has been certified as bargaining agent or has given or is entitled to give notice under section 14 or 53, sells his business, the trade union, or council of trade unions continues, until the Board otherwise declares, to be the bargaining agent for the employees of the person to whom the business was sold in the like bargaining unit in that business, and the trade union or council of trade unions is entitled to give to the person to whom the business was sold a written notice of its desire to bargain with a view to making a collective agreement or the renewal, with or without modifications, of the agreement then in operation and such notice has the same effect as a notice under section 14 or 53, as the case requires.

23. Section 63 preserves the collective bargaining and collective agreement rights of persons employed in a business when there is a change in the real or nominal ownership of that business. A sale of an incorporated business can come about by means of a sale of assets or by a sale of shares. Even without section 63, collective bargaining and collective agreement rights of employees would not be affected by a sale of shares of an incorporated business, because the legal identity of the corporate employer would remain unchanged. If the sale of business is accomplished by a sale of assets, the legal identity of the employer does change. The new employer is not named in the certificate or recognition agreement from which bargaining rights flow, nor in any existing collective agreement, and on general principles of

commercial law alone the new employer would not be bound or affected by any of those documents. This would be so even if the real beneficial or underlying ownership of the business remained unchanged, as where a sale of assets occurred between two corporations with identical shareholders. The choice between sale of assets and sale of shares as a means of transferring ownership of a business may have little effect on the continued day-to-day functioning of the business. Apart from section 63, however, the choice of form would affect collective bargaining and collective agreement rights of the employees engaged in those day-to-day operations. The object of section 63 is to ensure that the effect on these rights is uninfluenced by the choice of form. If a sale of assets is the form adopted for what is, in substance, a transfer of ownership of a business, section 63 imposes on the asset transaction the same labour relations result as obtains in a sale of shares, by imposing the vendor's bargaining and agreement obligations on the purchaser of the business: the purchaser stands in the shoes of his vendor for labour relations purposes. Of course, ownership of an unincorporated business can be transferred only by transferring assets. Significant as the legal form of ownership and control may be for commercial law purposes, it is not relevant to the purposes served by the *Labour Relations Act*. The form of ownership should be no more critical to continued collective bargaining and collective agreement rights than the form a transfer of ownership may take. Thus, section 63 prescribes the same labour relations result for unincorporated businesses as for incorporated ones: the purchaser of the business stands in his vendor's shoes. (For other statements on the purposes of section 63, see *Aircraft Metal Specialists Ltd.*, [1970] OLRB Rep. Sept. 705 at ¶¶5 and 6; *Marvel Jewelry*, [1975] OLRB Rep. Sept. 733 at ¶8; and *Metropolitan Parking Inc.*, [1979] OLRB Rep. Dec. 1193 at ¶¶18 to 26.)

24. Section 63 takes effect only if there is a "sale" of a "business". A sale of business will always involve the transfer of assets of some kind from one legal entity to another, whether the assets transferred are shares or assets used in the business; however, a transfer of assets will not always constitute a sale of business. When section 63 is invoked, the Board must determine whether there has been a "sale", a concept broadly defined in the statute and liberally interpreted by the Board: *Thorco Manufacturing Ltd.*, 65 CLLC ¶16,052. In determining whether there has been a sale, the Board is more concerned with the substance of transactions than with their form. Two or more transactions or events may, together, constitute a sale. As the Board noted in *Metropolitan Parking Inc.*, *supra*, at ¶28:

The Board has found a transfer of a business through a "chain" transaction, or sequence of sales (*Culverhouse Foods Ltd.*, [1976] OLRB Rep. Nov. 691; *Trenton Riverside Dairies*, [1964] OLRB Rep. May 72), a corporate reorganization and merger, (*Eaton Yale Ltd.*, [1971] OLRB Rep. Oct. 667; *Westeel-Rosco Ltd.*, [1966] OLRB Rep. Dec. 718) and through the offices of a receiver where "the business" has been transferred as a going concern (*Marvel Jewelry Ltd.*, [1975] OLRB Rep. Sept. 733; *Field-Price Ltd.*, [1973] OLRB Rep. Oct. 543; *Parnel Foods Ltd.*, [1971] OLRB Rep. Nov. 715.) The manner of disposition is irrelevant so long as a transfer has, in fact, taken place. The interposition of a third party, acting as an agent or conduit, does not affect the result.

25. The identification of a "sale" is usually less difficult than the determination whether the subject matter of the sale constitutes a "business" or "part of a business". In a "text-book" business acquisition by asset purchase, the purchaser seeks from the vendor the tangible and intangible assets employed in the business, assurances of continued commercial

relations with suppliers and customers, and covenants of the vendor with respect to various matters, including non-competition. Where all the textbook elements are present, it is not difficult to conclude that a sale of business has occurred. Some elements may be absent because, in the particular circumstances, those elements are not necessary, or because the parties or their advisors have not read the “textbook”, or because the parties intend to convey a business but do not wish it to appear so. Elements may also be absent because the parties have no desire or intention to convey a business. Not infrequently, the parties to a transaction are focusing simply on the effective conveyance of certain assets, and do not ask themselves whether the assets sold together constitute a business. That question is, however, one which the Board is regularly obliged to address. As the Board said in *Culverhouse Foods*, [1976] OLRB Rep. Nov. 691 at ¶16:

...In each case the decisive question is whether or not there is a continuation of the business....the cases offer a countless variety of factors which might assist the Board in its analysis: among other possibilities the presence or absence of the sale or actual transfer of goodwill, a logo or trademark, customer lists, accounts receivable, existing contracts, inventory, covenants not to compete, covenants to maintain a good name until closing or any other obligations to assist the successor in being able to effectively carry on the business may fruitfully be considered by the Board in deciding whether there is a continuation of the business. Additionally, the Board has found it helpful to look at whether or not a number of the same employees have continued to work for the successor and whether or not they are performing the same skills. The existence or non-existence of a hiatus in production as well as the service or lack of service of the customers of the predecessor have also been given weight. No list of significant considerations, however, could ever be complete; the number of variables with potential relevance is endless. It is of utmost importance to emphasize, however, that none of these possible considerations enjoys an independent life of its own; none will necessarily decide the matter. Each carries significance only to the extent that it aids the Board in deciding whether the nature of the business after the transfer is the same it is was [sic] before, i.e. whether there has been a continuation of the business.

In *Grand Valley Ready Mixed Concrete Supply Limited*, [1981] OLRB Rep. June 663, the Board described the appropriate analysis in this way:

...In most section 55 [now 63] applications, whether involving the alleged sale of the whole business or a part thereof, the nature of the alleged predecessor’s business organization provides the ultimate answer. The Board identifies its essential elements and determines if sufficient of these have been transferred to the successor as to allow the business and the employment which it generates to continue. See *Thunder Bay Ambulance Service*, [1978] OLRB Rep. May 467 and *Culverhouse Foods Limited*, [1976] OLRB Rep. Nov. 691. However, if as in *Canada Cement Lefarge*, [1977] OLRB Rep. Jan. 5, and *Darrigo Consolidated Holdings*, [1980] OLRB Rep. Jan. 29, assets have been disposed of which are peripheral or unrelated to the business organization to which the bargaining

rights at issue attach, the Board will not find that there has been a sale of a business within the meaning of the section.

20. The exercise becomes more complicated where, as in this case, the alleged successor has carried on a parallel business. Where the alleged successor has carried on a parallel business the result of the transaction may as easily be an expansion or alteration of his business as the transfer of the alleged predecessor's business. An employment opportunity which flows from an expansion or alteration of the business carried on by the alleged successor prior to the section 55 transaction does not trigger the operation of the section. The union's bargaining rights attach to the predecessor's business and their preservation is contingent upon a transfer and continuation of that business.

26. In *Metropolitan Parking Inc.*, *supra*, the Board observed that continuity of the work performed is not by itself a conclusive test for applicability of section 63:

For a transaction to be considered a "sale of a business" there must be more than the performance of a like function by another business entity. There must be a transfer from the predecessor of the essential elements of the business as a block or as a "going concern." A business is not synonymous with its customers or the work it performs or its employees. Rather, it is the economic organization which is used to attract customers or perform the work. The Legislature could have provided for the continuation of bargaining rights whenever there is a continuity of the work performed, but it did not do so. Bargaining rights are continued only when the employer transfers *his* business. The use of the active verb and possessive pronoun is not insignificant.

Section 53 of the *British Columbia Labour Code* and section 144 of the *Canada Labour Code* are similar to section 63 of the *Labour Relations Act*. Both the B.C. and Canada Labour Relations Boards have recognized that the language and purpose of these provisions require more to support a declaration than similar work, as appears from the following passage from the B.C. Board's decision in *Canadian Odeon Theatres Limited*, 82 CLLC ¶16,139, [1981] 3 Can. LRBR 372, at pages 374 and 375:

As the Board pointed out in *Lyric Theatre*, [[1980] 2 Can. LRBR 331], the similarity of work performed before and after the transfer is not sufficient of itself. The Canada Board put it best in *Radio CJIQ Limited and Newfoundland Broadcasting Ltd. and National Association of Broadcasting Employees and Technicians*, [1978] 1 Canadian LRBR 565 at 574:

But continuity of the work done is not sufficient alone to satisfy section 144. There must be some nexus between the two employers other than the fact that one employed persons to do certain work that the other now does or will do, before one can be declared the successor of the other. Otherwise a loss of work to a competitor employer would result in a successorship. There must be some continuity in the employing enterprise for which a union holds bargaining rights as

well as continuity in the nature of the work. The two go hand in hand.

27. *Dutch Boy Food Markets*, 65 CLLC ¶16,051 is one of the first cases in which the Board had an opportunity to assess an alleged sale of business in the retail food industry. In that case, Kitchener Foods offered to buy all of the leasehold improvements and fixtures on the premises from which Steinberg's then conducted its sole retail operation in Kitchener. The offer was conditional on the assignment to Kitchener Foods of Steinberg's leasehold interest in those premises. Steinberg's accepted the offer. The parties entered into a written agreement which contained no restrictive covenant by Steinberg's and expressly excluded "goodwill" from the purchase price. The Board rejected the argument that these features of the agreement precluded a finding that there had been a sale of business:

Had Kitchener Food only purchased the contents of the premises at 274 Highland Road and moved them into other premises we would have no difficulty in finding that the transaction was only the sale of assets. In the instant case, however, Kitchener Food acquired not just assets, but Steinberg's entire interest in the premises. Stated another way Steinberg's disposed of its entire operation in the Kitchener area which obviously must have had some effect on its operations in Ontario. If by the terms of the transaction Steinberg's had been restricted from carrying on business in the same area we would have no hesitation in saying that there was a sale of a "business" within the meaning of section 47a of the Act. The absence of such covenant, however, is not by any means conclusive that there was not a sale of a "business".

A retail food supermarket, unlike some other businesses, has no customer orders or lists which can be transferred to a purchaser who intends to carry on the same type of business. By the very nature of a retail food business, with the exception of the name, a vendor has no goodwill which he can effectively give or withhold from a purchaser. The success of a food supermarket is dependent, on large measure, upon the support of the people who live in the area in which the store is located. Accordingly, any goodwill consists in the habit of customers of the vendor continuing to patronize the food market located on the same premises. If there was any goodwill to be acquired by Kitchener Food it was inherent in the premises themselves in which Steinberg's had carried on the same type of business as that carried on by Kitchener Food. Accordingly, the exemption of goodwill from the purchase price, in our opinion, has no real meaning.

Similar arguments were similarly rejected in *L & M Food Markets (Ontario) Limited*, [1965] OLRB Rep. Sept. 440 and *Leader's Clover Farms Food Market*, [1966] OLRB Rep. Nov. 636, both cases in which the successor acquired in a single transaction the predecessor's premises, fixtures, and equipment along with considerable stock-in-trade: all but the brand-name inventory in the *L & M* case, and all but the meat, frozen food, damaged stock and brand-name inventory in *Leader's*. The successor supermarkets opened 3 and 16 days, respectively, after their predecessors' supermarkets closed. The Board in *Dutch Boy* found a hiatus of 7 weeks'

duration did not make the transaction there any less the sale of a business. It is perhaps noteworthy that, on the facts before it, the Board in that case was able to make a positive finding that the parties before them *intended* to engage in a sale of business:

Viewing the transaction more positively, *we find it most significant* that the wording of the Offer to Purchase itself clearly contemplates the sale of a "business". More particularly, the second paragraph of Article 2 on page 3 reads:

This transaction of purchase and sale is to be completed on or before the 31st day of December, 1964 on which date vacant possession of the *business* and *premises* of the Vendor is to be given to the Purchaser. (The underlining is added for emphasis.)

In our opinion, the above wording makes it abundantly clear that *it was the intention of the parties that Kitchener Food acquire by sale the "business" of Steinberg's.*

(emphasis added)

In assessing whether a sale of business has taken place, the absence of "textbook" elements becomes less critical if it is clear the parties thought they were engaged in a sale of business in a commercial sense.

28. Subsequent Board decisions all acknowledge, expressly or impliedly, the importance of the store premises as an element of a business in the retail food trade, and the significance of the inclusion of that asset in a putative "sale of business" transaction. The cases also reiterate the need to assess even that important factor in the context of all the surrounding circumstances, including the corporate relationship, if any, of vendor and purchaser, the continued presence or relocation of the vendor within the relevant market area, continued involvement of key personnel, the length of and reasons for the hiatus between the vendor's closing and the purchaser's opening, and any post-sale effort by the purchaser to identify its location by reference to the vendor prior operation: *Super City Discount Foods Limited*, [1970] OLRB Rep. Apr. 118; *Gordons Markets*, [1978] OLRB Rep. Dec. 1102; *Zehrs Markets Limited*, [1974] OLRB Rep. May 331; *Dominion Stores Limited*, [1979] OLRB Rep. 626; *Darrigo Consolidated Holdings Inc.*, [1980] OLRB Rep. Jan. 29; *More Grocerteria Limited*, [1980] OLRB Rep. Apr. 486. The importance of each factor is likewise a function of surrounding circumstances. The importance of both location and hiatus depend on the nature of the market served. The habit addressed in *Dutch Boy* is the habit of patronizing a business which has become identified with a location, and not just the tendency, all other things being equal, to shop near home. A hiatus in operation will diminish the force of that habit at a rate and to an extent which depend, presumably, on the nature of the shopping alternatives available, the regularity of resort to those alternatives, and the extent to which vendor or purchaser behaviour encourages or discourages any impression that the discontinuance of supermarket operations is temporary. It is not realistic to suppose that the relationship and application of these factors can be reduced to an algebraic formula. This is in part because when one goes beyond obvious generalities, the description and prediction of shopping behaviour cease to be the

proper subject of judicial or administrative notice and become a matter for empirical and expert evidence of a nature seldom, if ever, placed before the Board in these cases. More importantly, the attempt to reduce these matters to a formula, through expert evidence or otherwise, would be of limited use; answers to these questions about the retail market are not ends in themselves, but merely one of the means employed in assessing the still highly qualitative question whether a “business” has been sold. The lesson of the cases is that while location and premises are important elements of a retail food business, they are not themselves the business; even location and premises can be or become mere “surplus assets” which alone, or even in combination with other assets, can lack the dynamic or organic quality which distinguishes a business from an idle collection of assets: *Sunnybrook Food Market (Keele) Limited*, [1974] OLRB Rep. Jan. 47; and see *More Groceteria Limited*, *supra*, at ¶¶21-24.

IV

29. We are satisfied that Mr. Sitzler and Ms. Ross were totally candid with the Board on all the matters on which they testified. We accept at face value their description of the actions they took and their reasons for those actions. We agree with counsel for the applicant when he says that Victern was acting throughout in economic self-interest; we find nothing sinister in that. We find nothing suspicious about a landlord’s becoming increasingly serious about prospective tenants as the prospect of having space to rent matures. We would have been suspicious if a sophisticated commercial landlord had told us that, in the circumstances of this case, he would give prospective tenants no attention at all until he had a concluded agreement by the existing tenant to surrender its lease. We do not find that the interests in which Victern acted went beyond the interest of a commercial landlord of retail space. In particular, we find nothing in these facts to suggest that Victern was seeking to become a broker in the sale of Dominion’s retail business. We do not agree that Victern played here a role analogous to that played by receivers in such cases as *Marvel Jewelry*, *supra*, and *Field-Price Ltd.*, [1973] OLRB Rep. Oct. 543. The role played by Victern here is indistinguishable, for our purposes, from that of the landlord in *Sunnybrook*. The important question is not whether it was the former tenant or the landlord who initiated the question of a surrender of lease, but whether there was anything more to their dealings than a surrender of lease. In that regard, we do not find it significant in these circumstances that options or rights of first refusal on space were mentioned and then dropped as potential terms of an agreement to surrender Dominion’s lease. This was mere tinkering with the substantial bundle of rights whose surrender was under discussion. Had Dominion been interested in selling its business at the subject location, it could have set out to find an assignee for the lease and made the assignment conditional on the assignee purchasing fixtures. Dominion did not seek out Valencia or other potential supermarket assignees, any more than Valencia sought out Dominion. Both sought to deal with the landlord; neither did so on any conditional basis. Dominion’s surrender was not conditional on its finding a purchaser for any of its assets; indeed, it had no assurance that any new tenant or tenants would have any desire to purchase Dominion’s equipment or, for that matter, any need for such equipment. Equally, Valencia’s obligation to Victern was not conditional on its obtaining anything from Dominion. We are unable to discern from Valencia’s behaviour any interest in, or intention to acquire, part of the business of Dominion. What Valencia set out to do was to expand its existing business into a new location because of the market potential there for an Italian-style supermarket. What evidence there is of Dominion’s involvement in these transactions does not support an argument that a sale of business transaction was involved or intended.

30. The absence of evidence that the parties intended to engage in sale of business in a commercial sense does not determine the question under section 63. The objective result of transactions can be a "sale of business" despite the neutral or even contrary subjective intent of the parties to those transactions. That is not the result here. The absence of former Dominion employees among the Valencia workforce at this location is a neutral fact where, as here, Valencia has neither sought out nor avoided them. The coincidence of location and similarity of operation by themselves would favour a sale finding. However, the independence, each from the others, of the surrender of lease, the lease and the equipment purchase, the independence of the parties to those transactions and the length the premises remained vacant all weigh against finding a sale, as do the existence and similarity of Valencia's preexisting operation and its role as the source of management and key employees at the new location. On balance, we do not find a sale of business in the facts of this case. In our view, the presence of Valencia at Dominion's former location represents the expansion of a parallel business in which some assets of Dominion came to be used. Those assets did not alone constitute a business or part of a business, and it cannot be said in this case that an existing business has expanded by purchasing a competitor's business and refurbishing it. This application is, accordingly, dismissed.

31. In the course of the Board's hearing, counsel for the applicant requested reasons for one of our procedural rulings. We would be content to reduce those reasons to writing if counsel renews his request in writing, after considering whether those reasons would be of assistance.

2493-83-R International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (U.A.W.), Applicant, v. **X-Pert Metal Finishing Limited**, Respondent

Bargaining Unit – Practice and Procedure – Employer disputing inclusion of chemical control supervisor in unit on grounds of managerial function – Whether permitted to change ground of objection to lack of community of interest at commencement of officer examination – Alteration allowed where no objection raised by union counsel present at examination

BEFORE: Robert D. Howe, Acting Chairman, and Board Members W. G. Donnelly and F. S. Cooke.

DECISION OF THE BOARD; May 29, 1984

1. In a decision dated February 17, 1984 in respect of this application for certification, the Board noted that the parties had reached agreement on all matters in dispute between them, with the exception of the issue of whether the classification "chemical control supervisor" should be included in or excluded from the bargaining unit. Paragraph 4 of that decision reads:

The parties are in partial agreement with respect to description of the bargaining unit. The language upon which they have agreed is:

all employees of the respondent in the City of Burlington, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff.

The respondent contends that the classification of "chemical control supervisor" should also be excluded from the bargaining unit by virtue of section 1(3)(b) of the Act. The applicant opposes that requested exclusion.

In view of that dispute, the Board appointed Board Officer S. Nicholson "to inquire into and report to the Board on the duties and responsibilities of S. Stevenson, classified by the respondent as chemical control supervisor."

2. At the beginning of her report dated March 30, 1984, Ms. Nicholson apprised the Board of the following information:

Prior to the commencement of the examination, the respondent indicated that it would not be challenging the witnesses' job as being managerial, but rather that the job and the working conditions of an incumbent in that job had no community of interest with the production employees. The witness was therefore examined on the basis of community of interest.

The applicant was represented at the examination by Clare Meneghini and Jack Pawson. Since neither of them raised any objection when it was announced that the respondent intended to substitute "community of interest" as the basis for the proposed exclusion, the examination proceeded on that revised basis. Mr. Meneghini was given full opportunity to examine Ms. Stevenson (following her examination by Ms. Nicholson) and to re-examine Ms. Stevenson (following her examination by the respondent). He availed himself of those opportunities by asking a number of questions pertinent to the issue of community of interest.

3. In a letter dated April 6, 1984, Lorna J. Moses, the applicant's Canadian Co-ordinator of Organizing wrote to the Board as follows:

I am responding on behalf of the Applicant in the above noted case [File No. 2493-83-R] which is before the Board.

In this written submission, I wish to comment on the preamble, page 1, of the document as submitted by S. Nicholson dated March 30, 1984.

The final paragraph on page 1 states: "Prior to the commencement of the examination, the Respondent indicated that it would not be challenging the witnesses' job as being managerial, but rather that the working conditions of an incumbent in that job had no community of interest with the production employees."

The area that I question is the Respondent's change of argument from that of exclusion for managerial purposes to that of the basis of community of interest. Perhaps if this had been made known to the Applicant at the outset when the Application for Certification was before the Board

on February 17, 1984, all parties concerned could have been spared time, effort and expense.

All correspondence should be directed to the address appearing on this letterhead to the attention of Ms. Lorna J. Moses.

The Applicant *does not* request a hearing before the Board in connection with this case. The Board should make its finding based on the report submitted by S. Nicholson, Board Officer.

4. In some circumstances the Board has refused to permit a party to alter the basis upon which it seeks a bargaining unit exclusion. In *Weight Loss Inc.*, [1980] OLRB Rep. Dec. 1841, the employer, at the initial certification hearing and at the Board Officer's examination meetings, sought to exclude Assistant Director Sarah Bethune on the ground that she exercised managerial functions or was employed in a confidential capacity in matters relating to labour relations, within the meaning of section 1(3)(b) of the *Labour Relations Act*. However, after the Officer's report had been issued to the parties, the employer sought to obtain the requested exclusion not only on that basis, but also on the basis that the individual in question lacked a community of interest with the other employees. In holding that the employer could not alter its grounds for the requested exclusion at that stage in the proceedings, the Board wrote, in part, as follows:

8. Having regard to the submissions of the parties with respect to this matter, the Board is of the view that in the circumstances of this case, Ms. Bethune must be included in the bargaining unit unless the Board is of the opinion on the basis of the Labour Relations Officer's report that she exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations. The delineation of the scope of the issues to be inquired into and reported on by a Board Officer is not merely a technical matter. If that process is to be viable, it is essential that the Officer and the parties appearing before the Officer know with certainty in advance of the examination the precise scope of the issues which are to be dealt with; otherwise, it would not be possible for the representatives of the respective parties to properly prepare for and participate in the examination process. Thus, principles of fairness and natural justice require that each party know a reasonable time prior to the examination the nature and scope of the issue or issues to which the examination will pertain. A number of the questions asked by a Board Officer in an examination in which section 1(3)(b) is in issue are different than those asked in an examination in which the issue is that of community of interest. Furthermore, the questions asked and additional evidence introduced by the respective parties could also differ materially depending upon which of those matters was in issue. Indeed, the respective questions put to Ms. Bethune by the representative of the applicant and the representative of the respondent following her initial examination by the Labour Relations Officer confirm that the representatives of both parties understood the issue with respect to the inclusion or exclusion of Ms. Bethune to be confined to section 1(3)(b).

5. There is no indication in the present case that the respondent provided the applicant with any indication prior to the date of the examination that it intended to change the basis for the requested exclusion of Ms. Stevenson from a section 1(3)(b) issue to a community of interest issue. Alteration of the grounds for exclusion at that time could in some instances take the other party by surprise and preclude it from participating in the examination process in a meaningful and effective manner. In such circumstances, the Board might well not permit an alteration of that type. However, in the instant case, the applicant's representatives raised no objection when it was announced that the respondent intended to substitute "community of interest" as the basis for the proposed exclusion of the classification in question, and the examination proceeded on that revised basis. Moreover, although Ms. Moses criticizes the respondent's change of argument in her letter of April 6, 1984, and suggests, not unreasonably, that all parties might have been spared time, effort and expense if the applicant had made its position known earlier in the proceedings, she also expresses the view that the Board "should make its finding based on the report submitted by S. Nicholson". Under the circumstances, the Board is prepared to determine the matter of Ms. Stevenson's inclusion or exclusion on the basis of community of interest.

6. Ms. Stevenson, who described herself as a "lab technologist", takes samples from cleaning and plating tanks in the plant and chemically analyzes them in the respondent's laboratory, where she spends most of her working day. Approximately 25 per cent of her time is devoted to various clerical functions including filling out "add sheets" and other records. She reports directly to the respondent's Vice-President, Brian Calver, who trained her to do the job in question and is the only other person in the employ of the respondent capable of performing it. Unlike the respondent's production employees who punch a time clock, work regular hours on shifts scheduled by the respondent, and earn an hourly rate, Ms. Stevenson does not punch in or out, is permitted to set her own hours, and is paid a salary. Although she was working from 7:15 a.m. to 3:15 p.m. at the time of the application, it was her uncontradicted evidence that in previous years she has chosen to work a split shift in order to accommodate her responsibilities as a parent. It was also her uncontradicted evidence that in the summer-time she often elects to work from 6:00 a.m. till 2:00 p.m. She spends more time in the front office than she does in the plant and has very little interaction with bargaining unit employees. If she encounters problems with plant personnel in relation to chemical additions, she speaks with Mr. Calver or a foreman.

7. Having carefully reviewed and considered the Officer's report, we have concluded that, on balance, Ms. Stevenson is a technical employee who has a greater community of interest with the respondent's office and sales staff than with its production employees in the bargaining unit.

8. Having regard to the foregoing and to the agreement of the parties, the Board, pursuant to section 6(1) of the Act, finds that all employees of the respondent in the City of Burlington, Ontario, save and except foremen, persons above the rank of foreman, and office, technical and sales staff, constitute a unit of employees of the respondent appropriate for collective bargaining.

9. For the purpose of clarity, the Board notes that Chemical Control Supervisor Sandy Stevenson is a technical employee excluded from the bargaining unit.

10. A certificate will issue to the applicant for the bargaining unit described above.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING APRIL 1984

BARGAINING AGENTS CERTIFIED

No Vote Conducted

1215-83-R: Energy and Chemical Workers Union, (Applicant) v. C. E. Jamieson and Company (Dominion) Ltd., (Respondent).

Unit: "all employees of the respondent in Windsor, save and except supervisors and foremen, persons above the rank of supervisor and foreman, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (32 employees in unit).

1270-83-R: The Public Service Alliance of Canada, (Applicant) v. Ralson Construction a Division of Maplegrove Building Specialties Limited, (Respondent).

Unit: "all employees of the respondent at Moose Factory, save and except the manager, persons above the rank of manager, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (25 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

1317-83-R: United Food and Commercial Workers, International Union, AFL-CIO-CLC, (Applicant) v. F. B. I. Foods Ltd., Processing Division, (Respondent) v. Employee, (Objector).

Unit: "all quality-control technicians of the respondent at its plant in Trenton, Ontario, save and except forepersons and persons above the rank of foreperson, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period, and persons covered by a subsisting collective agreement." (3 employees in unit). (*Having regard to the agreement of the parties*).

1388-83-R: International Union of Operating Engineers, Local 793, (Applicant) v. Lilley Resources Ltd., (Respondent).

Unit #1: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit).

Unit #2: "all employees of the respondent in that portion of the District of Algoma south of the 49th parallel of latitude, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit).

1990-83-R: Canadian Union of Public Employees, (Applicant) v. The Corporation of the Township of West Carleton, (Respondent).

Unit: "all employees of The Corporation of the Township of West Carleton save and except the Clerk, Treasurer, Engineer, Road Superintendent, Clerk's secretary, Road Foremen, persons above the rank of Road Foreman, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period and persons covered by a subsisting collective agreement

between The Corporation of the Township of West Carleton and the Canadian Union of Public Employees and its Local 2293.” (9 employees in unit). (*Having regard to the agreement of the parties*).

2096-83-R: Labourers International Union of North America, Local 607, (Applicant) v. Canadian Mine Enterprises Limited and/or Cameron McMynn Contracting Limited, (Respondents).

Unit #1: “all construction labourers in the employ of the respondents in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (87 employees in unit).

Unit #2: “all construction labourers in the employ of the respondents in the District of Thunder Bay, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (87 employees in unit).

2150-83-R: Ontario Public Service Employees Union, (Applicant) v. Board of Governors of Ryerson Polytechnical Institute, (Respondent) v. Group of Employees, (Objectors).

Unit: “all employees of the respondent in the Municipality of Metropolitan Toronto, save and except Officers of the Corporation, Senior Directors and persons of equivalent or higher rank, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period, and persons covered by subsisting collective agreements.” (571 employees in unit). (*Clarity Note*).

2405-83-R: Service Employees Union, Local 210, Affiliated with Service Employees International Union, AFL-CIO-CLC, (Applicant) v. La Chaumiere Rest Home Ltd., (Respondent).

Unit #1: “all employees of the respondent in Puce, Ontario, save and except supervisors, those above the rank of supervisor, registered and graduate nurses, office and clerical staff, persons engaged in the construction industry, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (21 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Unit #2: “all employees of the respondent in Puce, Ontario, regularly employed for not more than 24 hours per week and students employed during the school vacation period save and except supervisors, those above the rank of supervisor, registered and graduate nurses, office and clerical staff, and persons engaged in the construction industry.” (17 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

2600-83-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 508, (Applicant) v. 55631 Ontario Limited, carrying on business as G. P. Construction, (Respondent).

Unit #1: “all plumbers, plumbers’ apprentices, steamfitters, steamfitters’ apprentices, pipefitters and pipefitters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (17 employees in unit).

Unit #2: “all plumbers, plumbers’ apprentices, steamfitters, steamfitters’ apprentices, pipefitters and pipefitters’ apprentices in the employ of the respondent in that portion of the District of Algoma south of the 49th parallel of latitude, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (17 employees in unit).

2758-83-R: Service Employees International Union, (Applicant) v. Domus Building Cleaning Co. Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: “all employees of the respondent at the University of Ottawa, Ontario, save and except resident manager, persons above the rank of resident manager, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (98 employees in unit). (*Having regard to the agreement of the parties*).

2818-83-R: International Brotherhood of Painters and Allied Trades, Local 1904, (Applicant) v. D. Curtola Interior Systems Inc., (Respondent).

Unit #1: “all painters and painters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (3 employees in unit).

Unit #2: “all painters and painters’ apprentices in the employ of the respondent in that portion of the District of Algoma south of the 49th parallel of latitude, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (3 employees in unit).

2891-83-R: Service Employees International Union, Local 268, (Applicant) v. The Ontario Finnish Res-thome Association, (Respondent).

Unit: “all employees of the respondent at Sault Ste. Marie, Ontario, in the District of Algoma, save and except supervisors, persons above the rank of supervisor, office and clerical staff.” (19 employees in unit). (*Having regard to the agreement of the parties*).

2893-83-R: International Leather Goods, Plastics and Novelty Workers’ Union, Local 8, (Applicant) v. Bradley-Fenn Enterprises Inc., (Respondent).

Unit: “all employees of the respondent in Brampton, Ontario, save and except forepersons, persons above the rank of foreperson, office, clerical, and sales staff, quality control staff, students employed during the school vacation period and persons regularly employed for not more than twenty-four hours per week.” (36 employees in unit). (*Having regard to the agreement of the parties*).

2959-83-R: Labourers’ International Union of North America, Local 1036, (Applicant) v. The Corporation of the Town of Blind River, (Respondent).

Unit: “all employees of the respondent in Blind River, Ontario, save and except foremen, persons above the rank of foreman, students employed during the school vacation period, office staff and persons covered by subsisting collective agreements.” (4 employees in unit). (*Having regard to the agreement of the parties*).

2979-83-R: Labourers’ International Union of North America, Local 183, (Applicant) v. Alcan Building Products, Division of Alcan Canada Products Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: “all employees of the respondent employed at 1111 Flint Road, Unit 22, in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor and office, clerical and sales staff.” (41 employees in unit). (*Having regard to the agreement of the parties*).

2990-83-R: Local Union 636 and the International Brotherhood of Electrical Workers, (Applicant) v. Amherstburg, Malden and Anderdon Community Centre, (Respondent).

Unit: “all employees of the respondent at Amherstburg, Ontario, save and except foremen, those above the rank of foreman, office and clerical staff, those covered by subsisting collective agreements and students employed during the school vacation period.” (3 employees in unit). (*Having regard to the agreement of the parties*).

3015-83-R: Retail, Wholesale and Department Store Union, AFL, CIO, CLC, (Applicant) v. T. Eaton Company Limited, (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all employees of the respondent at its retail stores in St. Catharines, Ontario, save and except sales managers, merchandise presentation managers, food services managers, foremen, persons above the rank of sales manager, merchandise presentation manager, food services manager and foremen, office and clerical staff, employees at Eaton Travel Ltd., management trainees, security staff, medical services nurses, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period and students employed on a co-operative programme with a school, college or university." (47 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Unit #2: "all employees of the respondent at its retail stores in St. Catharines, Ontario regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except sales managers, merchandise presentation managers, food services managers, foremen, persons above the rank of sales manager, merchandise presentation manager, food services manager and foremen, office and clerical staff, employees of Eaton Travel Ltd., management trainees, security staff, medical services nurses and students employed on a co-operative programme with a school, college or university." (47 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

3020-83-R: Service Employees Union, Local 210, Affiliated with Service Employees International Union, A.F.L.-C.I.O.-C.L.C., (Applicant) v. County of Bruce Health Unit, (Respondent).

Unit: "all employees of the respondent in Bruce County, Ontario, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (15 employees in unit). (*Having regard to the agreement of the parties*).

3037-83-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Applicant) v. Windmill Travel Limited, (Respondent).

Unit: "all employees of the respondent at Metropolitan Toronto, save and except, office manager and persons above the rank of office manager." (8 employees in unit). (*Having regard to the agreement of the parties*).

3055-83-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Applicant) v. Bin Inn Ltd., (Respondent).

Unit: "all employees of the respondent at Timmins, save and except manager, persons above the rank of manager and persons regularly employed for not more than twenty-four hours per week." (2 employees in unit). (*Having regard to the agreement of the parties*).

3056-83-R: United Electrical, Radio and Machine Workers of America (UE), (Applicant) v. Durham Specialty Electric Company, (Respondent).

Unit: "all employees of the respondent at Ajax, Ontario, save and except supervisors, those above the rank of supervisor, office, clerical and sales staff." (6 employees in unit). (*Having regard to the agreement of the parties*).

3066-83-R: D. & T. Association of Employees, (Applicant) v. Bartlett Transport Ltd., (Respondent).

Unit: "all employees of the respondent working at and out of Port Colborne, save and except foremen, persons above the rank of foreman, dispatcher, and office and sales staff." (15 employees in unit). (*Having regard to the agreement of the parties*).

3069-83-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Applicant) v. National Grocers Co. Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all office and clerical employees of the respondent at Oshawa, Ontario, save and except Office Manager and persons above the rank of Office Manager, Data Systems Co-ordinator, Confidential Secretary, Management Trainees, Re-order Specialists, students employed during the school vacation period and persons regularly employed for not more than 24 hours per week and employees covered by subsisting collective agreements." (7 employees in unit). (*Having regard to the agreement of the parties*).

3071-83-R: International Leather Goods, Plastics and Novelty Workers' Union, Local 8, (Applicant) v. Regency Plastics Company Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, students employed during the school vacation period and persons regularly employed for not more than 24 hours per week." (37 employees in unit). (*Having regard to the agreement of the parties*).

3078-83-R: United Brotherhood of Carpenters and Joiners of America Local 1988, (Applicant) v. Cornwall Door Systems Ltd., (Respondents).

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the geographic Townships of Elizabethtown, Augusta and Edwardsburg and all lands south thereof in the United Counties of Leeds and Grenville, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

3080-83-R: The United Brotherhood of Carpenters & Joiners of America, (Applicant) v. Big H. Construction, Division of Big H. Limited, (Respondent).

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

3086-83-R: International Association of Machinists and Aerospace Workers, (Applicant) v. Plastic Lustrro Inc., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at Cobourg, Ontario, save and except foremen, persons above the rank of foreman, and office and sales staff." (18 employees in unit). (*Having regard to the agreement of the parties*).

3092-83-R: Service Employees Union, Local 204, (Applicant) v. Heritage Nursing Home Ltd., (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto regularly employed for not more than (22 1/2) twenty-two and one-half hours per week and students employed during the school vacation

period save and except professional medical staff, registered nurses, supervisors, persons above the rank of supervisor, security guards, office staff and persons covered by subsisting collective agreements." (20 employees in unit). (*Having regard to the agreement of the parties*).

3093-83-R: Canadian Food Workers' Union, (Applicant) v. Primo Foods Limited, (Respondent) v. United Food & Commercial Workers, International Union, AFL-CIO-CLC, (Intervener).

Unit: "all employees of the respondent in Metropolitan Toronto save and except forepersons and persons above the rank of foreperson, office and clerical staff, sales staff and students employed during the school vacation period." (197 employees in unit). (*Having regard to the agreement of the parties*).

3099-83-R: Retail, Wholesale and Department Store Union, (Applicant) v. Stacey Brothers, A Division of Ault Foods Limited, (Respondent).

Unit: "all employees of the respondent at Mitchell, save and except foremen, persons above the rank of foreman, office staff, laboratory technicians, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (78 employees in unit). (*Having regard to the agreement of the parties*).

3105-83-R: International Molders & Allied Workers Union, (Applicant) v. Eber-East Products Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at Tillsonburg, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, and students employed during the school vacation period." (8 employees in unit). (*Having regard to the agreement of the parties*).

3117-83-R: United Plant Guard Workers of America, Local 1962, (Applicant) v. T. Eaton Company Limited, (Respondent).

Unit #1: "all security guards of the respondent employed at its retail stores in Brampton, Ontario, save and except loss prevention managers, persons above the rank of loss prevention manager, management trainees, employees assigned on a temporary orientation basis, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period and students employed on a co-operative programme with a school, college or university." (5 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Unit #2: "all security guards of the respondent at its retail stores in Brampton, Ontario, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except loss prevention managers, persons above the rank of loss prevention manager, management trainees, employees assigned on a temporary orientation basis and students employed on a co-operative programme with a school, college or university." (5 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

3119-83-R: Labourers' International Union of North America, Local 837, (Applicant) v. Oakington Construction Ltd., (Respondent).

Unit: "all construction labourers in the employ of the respondent in the Regional Municipality of Hamilton-Wentworth, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic township of Nassagaweya, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in unit).

0023-84-R: Christian Labour Association of Canada, (Applicant) v. Convalescent Aids of Canada Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the Township of Orillia, save and except the manager, office and clerical staff." (7 employees in unit). (*Having regard to the agreement of the parties*).

0024-84-R: Energy and Chemical Workers Union, C.L.C., (Applicant) v. Glitsch Canada Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: “all employees of the respondent at Uxbridge, Ontario, save and except foremen, persons above the rank of foreman, office clerical, technical and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (61 employees in unit). (*Having regard to the agreement of the parties*).

0046-84-R: Local 47 Sheet Metal Workers’ International Association, (Applicant) v. Hydraulique R. & O. Services Inc., (Respondent).

Unit #1: “all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in unit).

Unit #2: “all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in unit).

0058-84-R: Ontario Nurses’ Association, (Applicant) v. Bestview Holdings Limited, (Respondent).

Unit: “all registered and graduate nurses employed in a nursing capacity by Bestview Health Care Centre, Newmarket, save and except the Director of Nursing.” (5 employees in unit). (*Having regard to the agreement of the parties*).

0061-84-R: Canadian Union of Public Employees, (Applicant) v. Bimbo Day Nurseries Ltd., (Respondent).

Unit: “all employees of the respondent at Whitby, Ontario, save and except supervisors, persons above the rank of supervisor, office staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (10 employees in unit). (*Having regard to the agreement of the parties*).

0062-84-R: London and District Service Workers’ Union Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C., (Applicant) v. Louise Marshall Hospital, (Respondent).

Unit: “all employees of the respondent at Mount Forest, Ontario, save and except supervisors, persons above the rank of supervisor, professional medical staff, registered and graduate nurses, paramedical employees, office and clerical staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (12 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

0063-84-R: London and District Service Workers’ Union Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C., (Applicant) v. Louise Marshall Hospital, (Respondent).

Unit: “all employees of the respondent in Mount Forest, Ontario, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, professional medical staff, registered and graduate nurses, paramedical employees and office and clerical staff.” (32 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

0076-84-R: Ontario Public Service Employees Union, (Applicant) v. G. B. Catering Service Limited, (Respondent).

Unit: "all employees of the respondent at Prince Edward Heights in Picton, Ontario, save and except first cooks, storeroom manager, supervisors, and persons above the rank of supervisor." (30 employees in unit). (*Having regard to the agreement of the parties*).

0077-84-R: London and District Service Workers' Union Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C., (Applicant) v. Louise Marshall Hospital, (Respondent).

Unit: "all paramedical employees of the respondent at Mount Forest, Ontario, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (11 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

0078-84-R: London and District Service Workers' Union Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C., (Applicant) v. Louise Marshall Hospital, (Respondent).

Unit: "all office and clerical employees of the respondent at Mount Forest, Ontario, save and except supervisors, persons above the rank of supervisor, secretary to the administrator, persons regularly employed for not more than twenty-four (24) hours per week, and students employed during the school vacation period." (7 employees in unit). (*Having regard to the agreement of the parties*).

0094-84-R: Labourers' International Union of North America, Local 183, (Applicant) v. Dilsa Construction and Engineering Limited, (Respondent).

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit).

Unit #2: "all construction labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit).

0108-84-R: Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351, (Applicant) v. Hilton International Windsor (A Division of Hilton Canada Inc.), (Respondent).

Unit: "all employees of the respondent in the City of Windsor, save and except supervisors, persons above the rank of supervisor, office, sales, accounting and front desk staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (203 employees in unit). (*Having regard to the agreement of the parties*).

0124-84-R: Laundry and Linen Drivers and Industrial Workers, Local 847, (Applicant) v. The Wolf Film Corporation, (Respondent).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto save and except supervisors, persons above the rank of supervisor, office and clerical staff." (3 employees in unit). (*Having regard to the agreement of the parties*).

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

2706-83-R: Quaker Oats Employees Independent Union (Pet Food), (Applicant) v. The Quaker Oats Company of Canada Limited (Trenton Pet Food Division), (Respondent) v. United Food and Commercial Workers, (Intervener).

Unit: "all employees of the respondent in Pet Foods Division at Trenton, Ontario save and except foremen, those above the rank of foreman, office and technical staff, buyers and salesmen." (241 employees in unit). (*Clarity Note*).

Number of names of persons on revised voters' list		243
Number of persons who cast ballots	218	
Number of spoiled ballots		1
Number of ballots marked in favour of applicant		205
Number of ballots marked in favour of intervener		12

2707-83-R: Black Diamond Cheese Employees Independent Union, (Applicant) v. Black Diamond Cheese, a Division of Brooke Bond Inc., (Respondent) v. United Food and Commercial Workers, (Intervener).

Unit: "all employees of the respondent in Belleville, Ontario, save and except foreman, persons above the rank of foreman, office and sales staff and maintenance stockroom personnel." (231 employees in unit).

Number of names of persons on revised voters' list		231
Number of persons who cast ballots	218	
Number of spoiled ballots		1
Number of ballots marked in favour of applicant		158
Number of ballots marked in favour of intervener		59

2909-83-R: Amalgamated Clothing & Textile Workers Union, AFL-CIO-CLC, (Applicant) v. Sunburst Fashions Limited, (Respondent).

Unit: "all employees of the respondent in London, Ontario, save and except foremen, foreladies, persons above the rank of foreman and forelady, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and students under a co-operative program with a school, college or university." (40 employees in unit).

Number of names of persons on revised voters' list		41
Number of persons who cast ballots	40	
Number of spoiled ballots		1
Number of ballots marked in favour of applicant		24
Number of ballots marked against applicant		15

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

2342-83-R: United Steelworkers of America, (Applicant) v. York Barbell Co. Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the Municipality of Oakville, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the summer vacation period." (71 employees in unit).

Number of names of persons on revised voters' list		97
Number of persons who cast ballots	90	
Number of ballots marked in favour of applicant		54
Number of ballots marked against applicant		35
Ballots segregated and not counted		1

2513-83-R: Local Union 586, of the International Brotherhood of Electrical Workers, (Applicant) v. The Hydro Electric Commission of the City of Ottawa, (Respondent) v. Canadian Union of Public Employees, (Intervener) v. Group of Employees, (Objectors).

Unit #1: "all employees employed for six consecutive months as office employees excluding supervisors, persons above the rank of supervisor, private secretary to the general manager, private secretary to the assistant general manager, private secretary to the secretary-treasurer, secretary to the distribution engineer, secretary to the chief accountant, secretary to the chief of customer accounting, secretary to the chief of personnel, payroll clerk, persons employed for not more than twenty-four hours per week, students employed during the school vacation period, the nurse and engineering technicians." (131 employees in unit).

Number of names of persons on revised voters' list		109
Number of persons who cast ballots	94	
Number of ballots marked in favour of applicant		92
Number of ballots marked in favour of intervener;		2

Unit #2: "all office employees who fall within the bargaining unit applied for by the applicant but outside the scope of the bargaining unit in the existing collective agreement (office employees who have not been employed for six consecutive months." (7 employees in unit).

Number of names of persons on revised voters' list		4
Number of persons who cast ballots	3	
Number of ballots marked in favour of applicant		3
Number of ballots marked against applicant		0

2515-83-R: Local union 2228, of the International Brotherhood of Electrical Workers, (Applicant) v. The Hydro Electric Commission of the City of Ottawa, (Respondent) v. Canadian Union of Public Employees, (Intervener) v. Group of Employees, (Objectors).

Unit: "all employees in the works department who have been employed for six consecutive months by the works department save and except foremen, persons above the rank of foreman, office staff, engineering technicians, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (169 employees in unit).

Number of names of persons on revised voters' list		192
Number of persons who cast ballots	163	
Number of ballots marked in favour of applicant		161
Number of ballots marked in favour of intervener		2

Unit #2: "all employees in the works department who fall within the bargaining unit applied for by the applicant but outside the scope of the existing bargaining unit (that is employees in the works department who have not yet been employed for six consecutive months)." (3 employees in unit).

Number of names of persons on revised voters' list		3
Number of persons who cast ballots		1
Number of ballots excluding segregated ballots cast by persons whose name appear on voters' list		1

2657-83-R: Canadian Union of Public Employees, (Applicant) v. St. Francis Memorial Hospital, (Respondent).

Unit: "all registered and graduate nurses employed in a nursing capacity by the respondent in Barry's Bay, save and except head nurses and persons above the rank of head nurse." (19 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		20
Number of persons who cast ballots	17	
Number of ballots marked in favour of applicant		11
Number of ballots marked against applicant		6

2781-83-R: Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers,

and General Workers' Union, (Intervener #1) v. Canadian Union of Operating Engineers and General Workers, Local 111, (Intervener #2).

Unit: "all employees of the respondent in the Maintenance Department of the Property Management Division in the Ottawa area, save and except persons classified as foremen, persons above the rank of foreman, students hired on a part-time or seasonal basis, office and sales staff, persons otherwise covered for collective bargaining purposes, the elevator mechanics and their helpers, and the electricians employed by the respondent in the Regional Municipality of Ottawa-Carleton." (42 employees in unit). (*Clarity Note*).

Number of names of persons on revised voters' list		32
Number of persons who cast ballots	29	
Number of ballots marked in favour of applicant		28
Number of ballots marked in favour of intervener #1		1

2915-83-R: Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, (Applicant) v. Campeau Corporation, (Respondent) v. Canadian Union of Operating Engineers and General Workers, (Intervener).

Unit: "all elevator mechanics, helpers and electricians of the respondent in Ottawa, Ontario, save and except foremen, those above the rank of foreman and persons covered by subsisting collective agreements." (9 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		9
Number of persons who cast ballots	9	
Number of ballots marked in favour of applicant		9
Number of ballots marked in favour of intervener		0

2963-83-R: Canadian Union of Public Employees, (Applicant) v. The Regional Municipality of Haldimand-Norfolk, (Respondent) v. The Staff Association of Haldimand-Norfolk, (Incumbent).

Unit: "all employees of the respondent in the Region of Haldimand-Norfolk, save and except the Medical Officer of Health, Business Administrator, the Administrative Assistant, the Director of Public Health Inspection, Chief Public Health Inspector, the Dental Director, the Director of Nursing, nurses, supervisors and persons equal to or above these positions, persons above those ranks and persons regularly employed for not more than twenty-four (24) hours per week." (26 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Number of names of persons on revised voters' list		20
Number of persons who cast ballots	19	
Number of ballots marked in favour of applicant		18
Number of ballots marked in favour of intervener		1

Applications for Certification Dismissed – No Vote Conducted

2892-83-R: Service Employees Union, Local 204, Affiliated with S.E.I.U., A.F. of L., C.I.O., C.L.C., (Applicant) v. The Governing Council of the University of Toronto, (Respondent) v. The Canadian Union of Public Employees, (Intervener) v. Group of Employees, (Objectors). (125 employees in unit).

2998-83-R: Canadian Union of Operating Engineers and General Workers, (Applicant) v. The Sisters of St. Joseph of the Diocese of London in Ontario Operating St. Joseph's Hospital at Sarnia, Ontario, (Respondent). (6 employees in unit).

3081-83-R: Hotel Employees Restaurant Employees Union, Local 75, (Applicant) v. Windsor Raceway Holdings Limited, (Respondent). (3 employees in unit).

0092-84-R: Canadian Union of Operating Engineers and General Workers, (Applicant) v. Hilton International Windsor, (Respondent) v. Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351, (Intervener). (203 employees in unit).

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

2841-83-R: Christian Labour Association of Canada, (Applicant) v. Bestview Holdings Limited, (Respondent) v. Service Employees Union, Local 204, (Intervener).

Unit: "all employees of the respondent, carrying on business as Bestview Nursing Home, Orillia, in the City of Orillia, save and except supervisors, persons above the rank of supervisor, graduate and registered nurses, technical employees, office staff, students employed during the school vacation period, and those persons covered by a subsisting collective agreement between the applicant and the respondent." (49 employees in unit).

Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

2061-83-R: United Brotherhood of Carpenters and Joiners of America, Local 93, (Applicant) v. L. L. C. General Contractors Ltd., (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all carpenters and carpenter's apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry." (14 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in all sectors of the construction industry, excluding the industrial, commercial and institutional sector, in the Regional Municipality of Ottawa-Carleton and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman." (14 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		6
Number of persons who cast ballots	5	
Number of ballots marked in favour of applicant		2
Number of ballots marked against applicant		3

2644-83-R: United Food and Commercial Workers International Union, Canadian Labour Congress, AFL-CIO, (Applicant) v. Autotube Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at St. Mary's, save and except lead hands, persons above the rank of lead hand, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (62 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		31
Number of persons who cast ballots	31	
Number of ballots marked in favour of applicant		9
Number of ballots marked against applicant		22

APPLICATIONS FOR CERTIFICATION WITHDRAWN

2955-83-R: Labourers' International Union of North America, Local 837, (Applicant) v. Oakington Constr. Ltd., (Respondent).

3016-83-R: Canadian Union of Public Employees, (Applicant) v. Corporation of the Town of Onaping Falls, (Respondent).

3028-83-R: The Canadian Union of Public Employees, (Applicant) v. The Metropolitan Toronto School Board, (Respondent).

3036-83-R: The Laborers' International Union of North America, Local 1267, (Applicant) v. Robran Construction Ltd., (Respondent).

3040-83-R: Hotel Employees Restaurant Employees Union, Local 75, (Applicant) v. Howard Johnson (East) Hotel, (Respondent).

3053-83-R: Canadian Union of Public Employees, (Applicant) v. Niagara Ina Grafton Gage Home, (Respondent).

3057-83-R: Labourers' International Union of North America, Local 183, (Applicant) v. Vision Carpentry Ltd., (Respondent).

3070-83-R: United Electrical, Radio and Machine Workers of America (UE), (Applicant) v. Canadian Steelmaster Co. Limited, (Respondent).

3098-83-R: London and District Service Workers Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C., (Applicant) v. The Sisters of St. Joseph of the Diocese of London in Ontario, as owner and operator of St. Joseph's Hospital, London, Ontario, (Respondent).

0074-84-R: Labourers' International Union of North America, Local 527, (Applicant) v. Bedcolab Ltee/Ltd., (Respondent).

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

1617-83-R: Graphic Communications International Union, Local 211, (Applicant) v. W. F. Stevens Reproductions Inc., (Respondent) v. Thorn Press Limited, (Intervener). (*Granted*).

2880-83-R: The Carpenters District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Inter-All Construction Limited Steeles West Commercial Centre Inc., (Respondent). (*Withdrawn*).

2916-83-R: United Brotherhood of Carpenters and Joiners of America, Local 2041, (Applicant) v. Civic Drywall Inc. and B-C Drywall of Ottawa Limited, (Respondents). (*Withdrawn*).

0019-84-R: Canadian Paperworkers Union, (Applicant) v. Cooper Corrugated Containers Ltd. and C & B Corrugated Containers Inc., (Respondents). (*Terminated*).

0097-84-R: The Operative Plasterers' and Cement Masons' International Association of the United States and Canada Local 124, (Applicant) v. D'Angelo Plastering Company Limited and D'Angelo Plastering Company (1983) Ltd. and 112049 Ontario Limited, (Respondents). (*Withdrawn*).

SALE OF A BUSINESS

2560-83-R: Retail, Wholesale & Department Store Union, Local 414, (Applicant) v. Ancaster Supermarkets Limited, c.o.b. as I.G.A., (Respondents). (*Dismissed*).

0098-84-R: The Operative Plasterers' and Cement Masons' International Association of the United States and Canada Local 124, (Applicant) v. D'Angelo Plastering Company Limited and D'Angelo Plastering Company (1983) Ltd. and 112049 Ontario Limited, (Respondents). (*Withdrawn*).

UNION SUCCESSOR RIGHTS

2932-83-R: Graphic Communications International Union, Local 520, Peterborough, (Applicant) v. Nashua Canada Limited, (Respondent). (*Granted*).

2933-83-R: Graphic Communications International Union, Local 466, Toronto, (Applicant) v. Dixie Canada Inc., (Respondent). (*Granted*).

2934-83-R: Graphic Communications International Union, Local 512, Lindsay, (Applicant) v. Union Carbide Canada Limited, Lindsay Plant, (Respondent). (*Granted*).

0030-84-R: Communications, Electronic, Electrical, Technical and Salaried Workers of Canada, (Applicant) v. T. R. Services Limited, (Respondent). (*Granted*).

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

2227-83-R: Clifford Thibodeau, (Applicant) v. Energy and Chemical Workers Union, (Respondent) v. Absco Aerosols Limited/Amar Packaging Limited, (Intervener). (65 employees in unit). (*Dismissed*).

2825-83-R: Arthur Thompson, (Applicant) v. OPSEU Local 310, (Respondent). (26 employees in unit). (*Withdrawn*).

2947-83-R: Walter Burt, (Applicant) v. International Brotherhood of Painters & Allied Trades, Local Union #114 and the Ontario Council of the International Brotherhood of Painters & Allied Trades, (Respondent).

Unit: "all hourly employees of Belleville Plate & Window Glass, the registered business style and name of Kingston Plate & Window Glass (#3) Ltd. in Belleville, Ontario covered by the agreement, save and except management personnel, office and sales staff, guards, supervisors, and those above supervisors." (1 employee in unit). (*Granted*).

2948-83-R; Nesley Blackwood, (Applicant) v. International Brotherhood of Painters and Allied Trades, Local 1891, (Respondent) v. Johnson's Painting Co. Ltd., (Intervener #1) v. 526132 Ontario Incorporated carrying on business as Kos Decorating, (Intervener #2). (2 employees in unit). (*Withdrawn*).

2950-83-R: Brad Morton, (Applicant) v. International Beverage Dispensers' and Bartenders' Union, Local 280, (Respondent). (9 employees in unit). (*Dismissed*).

2977-83-R: Georgia McQuaker, (Applicant) v. Retail Clerks Union, Local 409, (Respondent).

Unit #1: "all employees of White Otter Inns Limited in the Township of Atikokan, save and except Managers, persons above the rank of manager, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (15 employees in unit). (*Granted*).

Unit #2: "all employees of White Otter Inns Limited in the Township of Atikokan regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except managers and persons above the rank of manager." (7 employees in unit). (*Granted*).

REFERRAL AS TO APPOINTMENT OF CONCILIATION OFFICER

2851-83-R: Barkman Builders Ltd., (Employer) v. United Brotherhood of Carpenters and Joiners of America, (Trade Union). (*Granted*).

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

1864-83-U: Holmes Foundry Limited, (Applicant) v. The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (U.A.W.) Local 456 and Robert Clarke et al, (Respondents). (*Withdrawn*).

2868-83-U: Thomas Lenathen, (Applicant) v. Jack McFadyen, President Toronto Teachers Federation, (Respondent). (*Dismissed*).

COMPLAINTS OF UNFAIR LABOUR PRACTICE

2393-82-U: Richard Brian Woods, (Complainant) v. Hotel Restaurant and Cafeteria Employees Union, Local 75 of the Hotel and Restaurant Employees and Bartenders International Union, (Respondent) v. The Sheraton Centre, (Intervener). (*Withdrawn*).

1305-83-U: Ontario Public Service Employees Union, (Complainant) v. Industrial Resource Centre (Windsor Essex Inc.), (Respondent). (*Withdrawn*).

1697-83-U: Canadian Paperworkers Union, (Complainant) v. Cooper Corrugated Containers Ltd., Peter Portelli, (Respondents). (*Terminated*).

1723-83-U: United Food and Commercial Workers International Union, Local 175, (Complainant) v. Silverstein's Bakery Limited, (Respondent). (*Withdrawn*).

1821-83-U: Amalgamated Clothing and Textile Workers Union, (Complainant) v. Fabulous Formals Ltd., (Respondent). (*Withdrawn*).

1897-83-U: Patsy Nero, (Complainant) v. United Rubber, Cork, Linoleum, and Plastic Workers of America, AFL.CIO.CLC, Local 455, (Respondent). (*Withdrawn*).

2176-83-U: Richard Patenaud and Knud Kristian Kaerbye, (Complainants) v. Labourers' International Union of North America Local 527 and Andre Roy, (Respondents). (*Withdrawn*).

2220-83-U: Local Union 787 Refrigeration Workers of Ontario of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, (Complainant) v. The Bank of Montreal and Coopers and Lybrand Limited, (Respondents). (*Withdrawn*).

2457-83-U: Jose Rafael Jacome, (Complainant) v. International Leather Goods Plastic and Novelty Workers Union, Local 8, (Respondent). (*Withdrawn*).

2529-83-U: Canadian Paperworkers Union, (Complainant) v. Cooper Corrugated Containers Ltd., David Cooper and Geordie Brown, (Respondents). (*Terminated*).

2606-83-U: Local 280 Bartenders' & Beverage Dispensers' of H.E.R.E. International Union, (Complainant) v. Wallace House, (Respondent). (*Dismissed*).

2684-83-U: Utility Workers of Canada, Local Union 1, (Complainant) v. Pickering Hydro-Electric Commission, (Respondent). (*Withdrawn*).

2722-83-U: Chester Pacan, (Complainant) v. Teamsters Union Local 879, and Ryder Truck Lines, (Respondents). (*Dismissed*).

2769-83-U: Peter Talamo, (Complainant) v. Canadian Paper Worker Union Local 1497 and MacMillan Bloedel Packaging, (Respondents). (*Dismissed*).

2800-83-U: Service Employees Union, Local 204, (Complainant) v. Trailer Master Freight Carriers Limited c.o.b. as Atripco Delivery Service, (Respondent). (*Granted*).

2802-83-U: Ronald Rodgers, (Complainant) v. The United Steelworkers of America (U.S.W.A.) on behalf of Local 13286 and Canadian General-Tower Ltd., Etobicoke, Plant, (Respondents). (*Dismissed*).

2815-83-U: Local 787 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, (Complainant) v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Maintenance Service Contractors Association and its Member Contractors as indicated on Schedule "A", (Respondent). (*Withdrawn*).

2850-83-U: United Steelworkers of America, (Applicant) v. Infasco Nut Co., Division of Ivaco Inc., (Respondent). (*Withdrawn*).

2855-83-U: United Brotherhood of Carpenters and Joiners of America, (Complainant) v. Aristokraft Vinyl Inc., (Respondent). (*Withdrawn*).

2861-83-U: Michael Husul, (Complainant) v. International Union of Operating Engineers Local 772, (Respondent). (*Withdrawn*).

2874-83-U: Ray Miron/Earl Roper, (Complainants) v. C.U.P.E. Local #149, (Respondent). (*Withdrawn*).

2895-83-U: Canadian Union of Public Employees, (Complainant) v. Northwestern Regional Library System, (Respondent). (*Withdrawn*).

2900-83-U: The Windsor Typographical Union, Local 553, I.T.U., (Complainant) v. The Windsor Star, A Division of Southam Inc., (Respondent). (*Withdrawn*).

2902-83-U: Graphic Communications International Union, Local 500-M, (Complainant) v. General Printers, A Division of Cairn Capital Limited, (Respondent). (*Withdrawn*).

2941-83-U: United Rubber, Cork, Linoleum and Plastic Workers of America, (Complainant) v. Canway Paper Products Limited, (Respondent). (*Withdrawn*).

2967-83-U: Canadian Union of Public Employees, (Complainant) v. Niagara Ina Grafton Gage Home, (Respondent). (*Withdrawn*).

2975-83-U: Office & Professional Employees International Union, Local 343, (Complainant) v. Canadian Airline Flight Attendants Association, (Respondent). (*Withdrawn*).

2976-83-U: Terry Beson, (Complainant) v. Flextile Ltd., (Respondent). (*Withdrawn*).

2989-83-U: United Brotherhood of Carpenters and Joiners of America, (Complainant) v. Aristokraft Vinyl Inc., (Respondent). (*Withdrawn*).

2992-83-U: Local Union 2028, of the International Brotherhood of Electrical Workers, (Complainant) v. Oshawa Public Utilities Commission, (Respondent). (*Withdrawn*).

3000-83-U: Ronald S. Patterson, (Complainant) v. Jim Gooley, (Respondent). (*Withdrawn*).

3004-83-U: Retail Clerks Union, Local 409, (Complainant) v. F. W. Woolworth Company Limited, (Respondent). (*Withdrawn*).

3027-83-U: Health Office and Professional Employees division of Local 206 United Food and Commercial Workers International Union, (Complainant) v. North Park Nursing Home Ltd., (Respondent). (*Withdrawn*).

3032-83-U: Bruce Cassman, (Complainant) v. Reimer Express Lines Ltd., (Respondent). (*Withdrawn*).

3038-83-U: Giovanna Birganti, (Complainant) v. Local Union #366 Glass, Pottery, Plastics, & Allied Workers International Union, (Respondent). (*Withdrawn*).

3050-83-U: Health Office & Professional Employees a division of Local 206 United Food & Commercial Workers International Union, (Complainant) v. Quinte Beach Nursing Home, (Respondent). (*Withdrawn*).

3059-83-U: Health, Office & Professional Employees a division of United Food & Commercial Workers Union, Local 206, (Complainant) v. Sara Vista Nursing Home, (Respondent). (*Withdrawn*).

3087-83-U: Office & Professional Employees International Union, Local 343, (Complainants) v. Ontario Secondary School Teachers' Federation, Fraternal Benefit Society, (Respondent). (*Withdrawn*).

3091-83-U: Commercial Workers Union, Local 486, (Complainant) v. Intercity Food Services Inc., (Respondent). (*Withdrawn*).

0011-84-U: Labourers' International Union of North America, Local 183, (Applicant) v. Alm Paving Ltd., (Respondent). (*Withdrawn*).

0029-84-U: Energy and Chemical Workers Union, C.L.C., (Complainant) v. Glitsch Canada Ltd., (Respondent). (*Withdrawn*).

0035-84-U: Ronald Coulson, (Complainant) v. Charles McCormick, President of UFCW Local 206 and United Food & Commercial Workers Union, Local 206, (Respondent). (*Withdrawn*).

0054-84-U: Marilyn Cormier, (Complainant) v. United Food & Commercial Workers Union, (Respondent). (*Withdrawn*).

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

2928-83-M: Sterling Rubber Limited, (Employer) v. Local 347, United Rubber, Cork, Linoleum and Plastic Workers of America, (Trade Union). (*Granted*).

2929-83-M: Work Wear Corporation of Canada Ltd., (Employer) v. Textile Processors, Service Trades, Health Care, Professional & Technical Employees International Union, Local 351, (Trade Union). (*Granted*).

2999-83-M: Canadian Linen Supply (Ontario) Limited, (Employer) v. Textile Processors, Service Trades, Health Care, Professional and Technical Employees, International Union, Local 351, (Trade Union). (*Granted*).

0012-84-M: The Canadian Linen Supply (Ontario) Limited, of the City of Ottawa, in the County of Carleton, (Employer) v. Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351, (Trade Union). (*Granted*).

JURISDICTIONAL DISPUTES

0990-83-JD: Sutherland and Schultz Ltd., (Complainant) v. Mechanical Contractors Association Ontario, the Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada and its Local Union No. 46, The Association of Millwrighting Contractors of Ontario Inc., The Millwrighting Contractors of Ontario Inc., The Millwrighting District Council of Ontario, The United Brotherhood of Carpenters and Joiners of America Local Union 2309, Ontario Erectors Association, Incorporated, The International Association of Bridge, Structural and Ornamental Ironworkers and The Ironworkers District Council of Ontario and Local Union 721, The Electrical Contractors Association of Ontario, The International Brotherhood of Electrical Workers and its Local 353, The Sheetmetal Employers Association, the Sheetmetal Workers International Association and its Local 305 and Ontario Sheet Metal and Air Handling Group, (Respondents). (*Withdrawn*).

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

2215-83-M: Canadian Union of Public Employees, Local 2424, (Applicant) v. Carleton University, (Respondent). (*Withdrawn*).

2665-83-M: Office & Professional Employees International Union Local 468, (Applicant) v. Thames Valley Children's Centre, (Respondent). (*Withdrawn*).

2699-83-M: Moira-Schuster Fuels Division of Ultramar Canada Inc., (Applicant) v. Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union No. 91 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Respondent). (*Withdrawn*).

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

2525-83-OH: Mike Lacasse, (Complainant) v. Regional Municipality of Ottawa-Carleton, (Respondent). (*Withdrawn*).

3006-83-OH: U.A.W. Local 1769, Kingsville Ont. (Box 411) on behalf of the following members: Gwen Emslie, Joanne Grayer, Katrina Spevak, Marie Webb, Sylvia LaForest, (Complainant) v. Precision Spring of Canada Ltd., Wgle Avenue, Kingsville, Ontario, (Respondent). (*Withdrawn*).

COLLEGES COLLECTIVE BARGAINING ACT

Applications for Consent to Prosecute

2283-83-U: Ontario Public Service Employees Union, (Applicant) v. Dr. G. J. Bissett and The Board of Governors of Fanshawe College of Applied Arts and Technology, (Respondents). (*Dismissed*).

CONSTRUCTION INDUSTRY GRIEVANCES

1556-82-M: The Toronto-Central Ontario Building and Construction Trades Council on its own behalf and on behalf of The International Association of Heat and Frost Insulators, Local 95; The Marble Tile and Terrazzo Workers Union, Local 31; The United Association of Journeymen and Apprentices of the

Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 46; and The Labourers' International Union of North America, Local 506, (Applicants) v. M. J. Guthrie Construction Limited and Rosedale Construction, (Respondents). (*Granted*).

0276-83-M: The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 46, (Applicant) v. Sutherland and Schultz Ltd., (Respondent). (*Withdrawn*).

1837-83-M: United Brotherhood of Carpenters and Joiners of America, Local 2486, (Applicant) v. Roman Plastering & Acoustical Co., (Respondent). (*Granted*).

1898-83-M: Labourers' International Union of North America, Local 1059, (Applicant) v. Sandercock Construction (1976) Ltd., (Respondent). (*Dismissed*).

2276-83-M: United Brotherhood of Carpenters and Joiners of America, Local 38, (Applicant) v. A. Volpatti Plastering & Construction Ltd., (Respondent). (*Granted*).

2306-83-M: United Brotherhood of Carpenters and Joiners of America, Local Union 1669, (Applicant) v. A. Simoes Construction Co. Ltd., (Respondent). (*Granted*).

2383-83-M: International Association of Bridge, Structural and Ornamental Iron Workers, Local Union No. 700, (Applicant) v. Crescent Handling Systems, (Respondent). (*Granted*).

2575-83-M: The International Brotherhood of Electrical Workers, Local 1788, (Applicant) v. The Electrical Power Systems Construction Association (EPSCA) and Ontario Hydro, (Respondents). (*Withdrawn*).

2789-83-M: Labourers' International Union of North America Local 183, (Applicant) v. Colavita Construction Co. Ltd., (Respondent). (*Withdrawn*).

2968-83-M: Local 200 of Ontario Council of The International Brotherhood of Painters and Allied Trades, (Applicant) v. Meteor Painters Contractors (Canada) Ltd. of the Ontario Painting Contractors Association, (Respondent). (*Withdrawn*).

2969-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. United Land Corporation Limited, (Respondent). (*Withdrawn*).

3007-83-M: International Brotherhood of Electrical Workers Local Union 353, (Applicant) v. Simplex Electric, 1970, (Respondent). (*Withdrawn*).

3008-83-M: International Brotherhood of Electrical Workers Local Union 353 Member of I.B.E.W., C.C.O., (Applicant) v. L. G. Barrett Electric Ltd., (Respondent). (*Granted*).

3009-83-M: International Brotherhood of Electrical Workers Local Union 353, Member of I.B.E.W., C.C.O., (Applicant) v. Paynel Electrical Contractors Ltd., (Respondent). (*Granted*).

3033-83-M: Drywall, Acoustic, Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Maco Construction, (Respondent). (*Withdrawn*).

3034-83-M: Drywall, Acoustic, Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Lochlands Limited, (Respondent). (*Withdrawn*).

3042-83-M: Labourers' International Union of North America, Local 493, (Applicant) v. B. N. Tile and Terrazzo Co. Ltd., (Respondent). (*Withdrawn*).

3043-83-M: Labourers' International Union of North America, Local 493, (Applicant) v. Acme Building & Construction Ltd., (Respondent). (*Granted*).

3044-83-M: Labourers' International Union of North America, Local 493, (Applicant) v. Bot Construction Limited, (Respondent). (*Withdrawn*).

3064-83-M: United Brotherhood of Carpenters and Joiners of America, Local 785, (Applicant) v. Halton Drywall Ltd., (Respondent). (*Granted*).

3101-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. Andrew Paving & Eng. Ltd., (Respondent). (*Withdrawn*).

3102-83-M: Labourers' International Union of North America, Local 183, (Applicant) v. Prime Asphalt Paving Co. Ltd., (Respondent). (*Withdrawn*).

3104-83-M: Construction Workers Local 6, affiliated with The Christian Labour Association of Canada, (Applicant) v. DeGroot's Plumbing & Heating Ltd., (Respondent). (*Granted*).

3109-83-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46, (Applicant) v. Donnelly-Ostapiec Ltd., (Respondent). (*Withdrawn*).

3110-83-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46, (Applicant) v. Jaddco Anderson Ltd., (Respondent). (*Withdrawn*).

0005-84-M: International Brotherhood of Electrical Workers Local Union 353 Member of I.B.E.W., C.C.O., (Applicant) v. Delta Door and Electric Systems, Unit 12, 3410 Midland Avenue, Scarborough, Ontario, (Respondent). (*Withdrawn*).

0006-84-M: International Brotherhood of Electrical Workers Local Union 353 Member of I.B.E.W., C.C.O., (Applicant) v. Goodenough Electric, 658 Vaughan Road, Toronto, Ontario, (Respondent). (*Withdrawn*).

0024-84-M: Labourers' International Union of North America, Local 183, (Applicant) v. Gamen Paving Construction Ltd., (Respondent). (*Withdrawn*).

0038-84-M: United Brotherhood of Carpenters & Joiners of America, Local Union 18, (Applicant) v. Pollux Development Ltd., (Respondent). (*Withdrawn*).

0048-84-M: Labourers' International Union of North America, (Applicant) v. Designcraft Limited, (Respondent). (*Withdrawn*).

0079-84-M: International Association of Bridge, Structural and Ornamental Ironworkers, Local Union No. 736, (Applicant) v. Treblex Limited, (Respondent). (*Withdrawn*).

0089-84-M: Local 1190, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Ramo Carpentry Ltd., (Respondent). (*Granted*).

0100-84-M; 0101-84-M: United Brotherhood of Carpenters and Joiners of America, Local 785, (Applicant) v. Duet Interior System, (Respondent). (*Granted*).

0102-84-M: United Brotherhood of Carpenters and Joiners of America, Local Union 93, (Applicant) v. Ottawa Door Consultants Ltd., (Respondent). (*Granted*).

0106-84-M: United Brotherhood of Carpenters and Joiners of America, Local 494, (Applicant) v. City Acoustics Ltd., (Respondent). (*Granted*).

0107-84-M: United Brotherhood of Carpenters and Joiners of America, Local 494, (Applicant) v. Essex Acoustics & Drywall, (Respondent). (*Withdrawn*).

0115-84-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Ferracon Construction Ltd., (Respondent). (*Granted*).

0116-84-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Latto Construction Limited, (Respondent). (*Granted*).

RIGHT TO ACCESS

2828-83-M: Sheet Metal Workers International Association, Local 397, (Applicant) v. Teck Corporation and/or Contract Construction, (Respondent). (*Granted*).

2840-83-M: United Brotherhood of Carpenters and Joiners of America, Local 1669; Ironworkers Local 759, International Association of Bridge, Structural and Ornamental Ironworkers; and Millwright Local Union 1151, (Applicants) v. Tech Corona, Contract Construction Incorporated, Perma Steel, Merrit Consultants, (Respondents). (*Granted*).

3074-83-M: Labourers' International Union of North America, Local 607, (Applicant) v. Teck Corporation, Great Lakes Steel Ltd., (Respondents). (*Granted*).

APPLICATIONS FOR ACCREDITATION

1277-83-R: Interior n labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipality United Brotherhood of Carpenters and Joiners of America, (Respondent). (*Granted*).

*Ontario Labour Relations Board,
400 University Avenue,
Toronto, Ontario*

ISSN 0383-4778

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